

Lead-Based Paint Disclosure Implementation

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Introduction

The new federal rules for the disclosure of lead-based paint will have a substantial impact upon the practice of all REALTORS® who sell or lease residential properties. These rules require that sellers and landlords of residential real estate built before 1978 disclose lead-based paint and lead-based paint hazards (collectively referred to as LBP), and provide lead-based paint information and warnings to buyers and tenants before they become contractually obligated to buy or rent. All real estate agents, except buyer's agents paid solely by the buyer, are required to advise the owners of their obligations under the rules and ensure compliance with the rules.

This *Legal Update* introduces REALTORS® to the offer and lease addenda developed by the WRA for the use of agents involved in residential transactions. After a review of the effective dates for the federal rules and an overview of the new WRA addenda, the *Update* presents step-by-step guidelines for compliance with the rules using the WRA addenda, first for sales transactions, then for lease transactions. The guidelines

include discussion of the requirements for certified inspectors and risk assessors and the tests typically conducted to detect the presence of lead-based paint. This *Update* may be used most effectively in conjunction with *Legal Update 96.04* which discusses the federal LBP disclosure rules in detail.

Effective Dates for the LBP Rules

The federal LBP rules take effect on either Sept. 6, 1996, or Dec. 6, 1996, depending upon the number of residential dwellings owned by the seller or landlord. The official text of the federal LBP disclosure rules provides that: "The requirements in this subpart take effect in the following manner: (1) For owners of more than 4 residential dwellings, the requirements shall take effect on September 6, 1996. (2) For owners of 1 to 4 residential dwellings, the requirements shall take effect on December 6, 1996."

"Residential dwelling" means: "(1) A single-family dwelling, including attached structures such as porches and stoops; or (2) A single-family dwelling unit in a structure that

contains more than one separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one or more persons.”

To find out which deadline applies to a particular owner, count the total number of dwelling units he or she owns. For example, if a person owns two duplexes and one house, the effective date for that person for the new LBP disclosure rules is Sept. 6, 1996, because this person owns 5 residential dwellings. The effective date for a person who owns one duplex and two houses, on the other hand, is Dec. 6, 1996, because this person owns 4 dwelling units. (Note that a personal residence counts as an owned dwelling unit and that all owned dwelling units are counted regardless of whether they were built before 1978 or at a later time.)

Obviously, the safest approach is to comply with the rules beginning in September, without spending time counting dwelling units. In cases where compliance with the federal LBP rules is not instituted, REALTORS® are obligated by Wisconsin license law to disclose any residential unit built before 1978 to the parties as a potential material adverse fact, as discussed in *Legal Update 93.11*.

Agent Responsibilities

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 or landlord for the purpose of selling or leasing target housing. For real estate agents in sales transactions, this means all listing, selling, cooperative, and buyer’s agents (except those paid

only by the buyer). In rental transactions, this means property managers, and leasing and rental listing agents.

To ensure compliance with the rules, an agent must inform the seller or landlord of his or her obligations under the federal LBP rules; and ensure that the seller or landlord has performed all activities required under the rules, or personally ensure compliance with the rule requirements. HUD and EPA’s commentary to the final rules indicates that this means that agents must inform sellers and landlords of their obligations, and make sure that the required activities are completed either by the seller or landlord, or by the agent personally.

WRA’s Addenda for LPB

The WRA has developed an offer addendum and a lease addendum for use by REALTORS® complying with the federal LBP rules. These addenda have been designed to provide effective checklists and tools for compliance. Unlike some of the other addenda which have been published, these addenda contain more detail for the benefit of the parties and the agents using them. The back of each form contains a summary of the federal LBP requirements for compliance and includes pertinent definitions from the federal disclosure rules. The sales addendum also includes a lead-based inspection contingency, modeled after the inspection contingency in the WB-11 Residential Offer to Purchase.

The LBP offer addendum is called Addendum LS to Offer to Purchase - Lead-Based Paint Disclosures and Acknowledgments and appears on pages 4-5 of this *Update*. The “LS” refers to “lead sales.” The LBP lease addendum is called Addendum LL to Lease - Lead-Based Paint Disclosures

and Acknowledgments and appears on pages 12-13 of this *Update*. The “LL” refers to “lead lease.” These addenda will be available at the WRA for purchase beginning in August.

REALTORS® must keep in mind that the federal LBP rules require the use of an attachment to the offer containing the elements outlined on the back of Addenda LS in all transactions involving the sale of residential dwelling units built before 1978. In lease transactions, the required elements listed on the back of Addenda LL must appear either in the lease itself or as an attachment to the lease.

The specific components of Addendum LS and Addendum LL will be discussed in the following guidelines for LBP compliance. The guidelines for sales transactions are followed by the guidelines for lease transactions.

LBP Compliance in Sales Transactions

When a seller uses the services of real estate licensees in marketing his or her property, those agents are responsible for ensuring that the seller complies with the federal LBP disclosure rule requirements. The listing agent generally will be best situated to advise the seller of his or her obligations under the LBP law, and to make sure that the seller discloses any known LBP to the buyer and furnishes the buyer with any available LBP records. The cooperating agent (subagent, buyer’s agent, etc.) is generally best situated to provide the buyer with the LBP hazard information pamphlet, offer the buyer a LBP inspection contingency, review the required disclosure and acknowledgment attachment with the buyer, and make sure that the

attachment or addendum is properly signed and made part of the offer to purchase.

The following guidelines discuss the measures that each agent may assume to assure that federal LBP rules are complied with in a sales transaction. The guidelines assume the more predominant traditional transaction where both a listing agent and a cooperating agent are involved. The guidelines will assume that any buyer's agent is not being paid solely by the buyer. Such buyer's agents are not responsible for ensuring compliance with the federal LBP disclosure rules. Following the primary sale guidelines, situations where other agent involvement patterns are present will also be discussed.

Listing the Residential Property

The listing agent will inspect the property and complete the listing contract, agency disclosure form or WRA listing contract addendum, and real estate condition report (RECR), as usual. The following guidelines detail the steps which must be taken by the listing agent to comply with the federal LBP rules.

1. **Determine if the property is target housing.** This may be determined by asking and answering the following questions.

a. Is the property a dwelling unit, that is, a single-family home, residential condominium unit, unit in a residential cooperative, etc.?

b. Was the dwelling unit built before 1978? Listing agents may ask the seller for information about the age of the house or may consult municipal records if the property's age is unknown or in doubt. It may be prudent to obtain some sort of written

record for the agent's file to confirm the property's age if there is any doubt or where it is a close call.

If the answers to both of these questions are yes, it is target housing.

c. **Is it exempt target housing?** Exempt target housing in a sales transaction includes property sold at foreclosure, housing for the elderly where at least one initial occupant is at least 62 years old and where there are no resident children under age 6, housing for the disabled where there are no resident children under age 6, and "0-bedroom" dwellings where the living area is not separated from the sleeping area. These exemptions are further discussed in *Legal Update 96.04*. If the housing is not target housing or is exempt, then compliance with the federal LBP rules is not required.

2. **Look for painted surfaces in bad condition while inspecting the property.** While a listing agent surely cannot tell whether there is lead-based paint present simply by just looking at it, painted surfaces in poor condition generally constitute a LBP hazard if it turns out the paint is lead based. Peeling, chipping or cracking paint is a hazard if the paint is lead based. Also lead dust from friction sources such as windows, door frames and stairs is a hazard if the paint is lead based. These items should be noted during the property inspection unless it is clear that the property is not target housing or is exempt. These items will be required to be disclosed by the listing agent as potential material adverse facts pursuant to Wis. Admin. Code s. RL 24.07(3) if they are not disclosed by the seller on Addendum LS or by an LBP contractor in an LBP inspection or risk assessment report.

3. **Advise the seller of his or her obligations under the LBP rules.** If the property is non-exempt target housing, the listing agent must advise the seller of his or her obligations under the federal LBP rules. The listing agent may produce Addendum LS and use it as the basis for the explanation. The back side of Addendum LS explains the seller's disclosure requirements, the buyer's right to an LBP inspection contingency, and the certification and acknowledgment requirements, as well as defining several of the important terms used in the rules. After discussing these disclosure requirements, the seller should be urged to read the explanations on the back of the form. If the agent has advised the seller of his or her obligations under the federal LBP rules, the agent will not be held liable for failing to disclose to the buyer any LBP information the seller did not share with the agent.

4. **Ask the seller if he or she has any knowledge of LBP on the property.** Obviously the seller is unlikely to know for sure that there is LBP present unless it has been previously tested. If the seller indicates knowledge of LBP, ask the seller how this is known. The seller should also be asked whether there are any painted surfaces in bad shape, i.e., chipped or cracked paint, paint dust, etc. This information will be needed for the completion of Addendum LS.

5. **Obtain copies of any available LBP records pertaining to the property.** If the seller indicates that prior testing occurred, the seller must provide copies of all available testing reports and records. "Available" is defined to mean in the seller's possession or reasonably obtainable by the seller at the time of the disclosure. "Reasonably obtainable" records include records maintained by

a separate or outside entity such as a property management company or attorney, and copies of reports retained by the original inspector or risk assessor that would be available to the seller if the original records were lost or destroyed.

Thus the listing agent may end up helping the seller track down records held by the original inspector if the seller cannot locate his or her copies of the reports. The listing agent should check with all companies that did testing. Failure of the listing agent to make this effort may result in the agent being found responsible for failing to ensure compliance. If the tests reports and records cannot be found after a reasonable effort, the agent should have the seller disclose that the property was tested and give as much information about the test results as the seller can remember.

6. Have the seller complete and sign Addendum LS. The seller should complete the Seller's Disclosures section of Addendum LS and sign the addendum in the Certification section. The Certification section of the Addendum LS indicates that all signatories are certifying that the information provided by them is true and accurate to the best of their knowledge.

In the Seller's Disclosures section, the seller discloses any known LBP information (an attachment may be needed). This should include any information concerning the source of the sellers' knowledge, other than LBP reports and records which will be inserted in this section, and information about the condition of painted surfaces. The seller should be encouraged to also disclose this information in the RECR.

7. The listing agent signs Addendum LS. At this point, the listing agent may sign the Addendum LS.

The Agents' Acknowledgment section of Addendum LS indicates that the seller has been informed of the seller's obligations under the federal LBP rules, and that the agent is aware of his or her duty to ensure compliance with the federal LBP law. The listing agent should be in a position where he or she may comfortably certify that this is true to the best of his or her information.

It may be prudent to have more than one completed copy of Addendum LS so that the listing agent can be ready if more than one buyer makes an offer on the property. A copy of the Addendum LS signed by the seller should also be left with the seller and a copy should be retained for the listing agent's file.

Marketing the Residential Property

When marketing the property, the listing agent should decide on the most effective way of informing the cooperating agent that the property is target housing and that disclosures of LBP information will be required. The listing agent may wish to indicate on the data sheets that the property was built before 1978 or that it is target housing. Waiting until an offer is submitted will likely not work very well because either the buyer will have to redo the offer with Addendum LS and all of the accompanying disclosures or the seller will have to make the LBP disclosures and counter the offer to include Addendum LS. Buyers may not be very happy to discover at the last minute that there is additional paperwork and/or that the property may contain LBP.

The federal LBP rules do not require that every buyer prospect attending an open house or a showing must be given the LBP disclosures, reports

and Addendum LS. However, this may prove to be a practical technique when there is LBP information and reports to be disclosed. Only buyers who actually enter into accepted offers are required to receive this information. Obviously there may be multiple accepted offers (primary offer, one or more secondary offers). Accordingly, the listing agent may be wise to have a few packets of the Addendum LS, signed by the seller, and the accompanying copies of any LBP reports and records ready for buyers who make offers.

Offer Negotiations

When a buyer is ready to make an offer, the cooperating agent will hopefully have been made aware that this is non-exempt target housing requiring LBP disclosures. The listing agent's job is to make sure that the buyer who wants to write the offer has the Addendum LS completed and signed by the seller and copies of all LBP reports and records. Once this has been accomplished, the responsibility for LBP rule compliance will generally shift to the cooperating agent. The following are the tasks which the cooperating agent generally will be best situated to perform.

1. Give the buyer an EPA-approved LBP hazard information pamphlet. This may be the EPA's pamphlet entitled "Protect Your Family From Lead in Your Home." This pamphlet is generally available for purchase for about 50 cents each. Alternatively, the buyer may be given a copy of the pamphlet which will be made available by the WRA.

After negotiations with the Wisconsin Department of Health and Social Services (DHSS) and the EPA, the WRA has concluded that the most feasible approach to providing Wisconsin REALTORS® with an

approved LBP pamphlet at an economical rate is to publish a pamphlet substantially like the EPA pamphlet. At the same time, providing Wisconsin county health department and other local contact numbers is also desirable. This will first be done using the equivalent of the EPA pamphlet along with a Wisconsin contact number insert. Later printings will incorporate the Wisconsin contact numbers directly into the pamphlet once it is established that the numbers will be permanent. The WRA expects to have these pamphlets available for purchase in August at a cost of under 30 cents each. Prices will vary depending upon the quantity ordered.

If possible, it may be best to give the buyer the pamphlet as early as possible, with lots of encouragement that he or she read it before the offer is drafted. Delivery of the pamphlet to the buyer should be noted in the cooperating agent's file.

2. Give the buyer Addendum LS and copies of the seller's LBP reports and records. The buyer who is about to write an offer should be given a copy of Addendum LS which has been completed by the seller and signed by the seller and listing agent. Copies of any LBP reports and records concerning the property and received from the listing agent should also be given to the buyer.

Lead Warning Statement. The cooperating agent may then review the Addendum LS with the buyer, starting with the Lead Warning Statement. Cooperating agents may wish to encourage the buyer to immediately read the statement.

Seller's Disclosures. The cooperating agent may next go over the seller's disclosures of known LBP or paint in poor condition, if any. The agent may also give the buyer an overview

of any LBP reports and records provided. Specific questions, however, should be directed to the contractor who performed the LBP inspection or risk assessment, or to other qualified professionals.

Lead-Based Paint Inspection Contingency. Addendum LS gives the buyer the choice of having a lead-based paint inspection contingency or waiving the contingency. This is signified by having the buyer check either the box next to the waiver statement or the box next to the LBP inspection contingency. If no box is checked, the buyer will be deemed to have elected the LBP inspection contingency.

This LBP inspection contingency is closely modeled after the inspection contingency in the residential offer to purchase. This provision makes the offer to purchase contingent upon the buyer having an LBP inspection or risk assessment performed which reveals that no lead-based paint or lead-based paint hazards are present on the property. "Lead-based paint" and "lead-based paint hazard" are defined on the reverse side of Addendum LS. The contingency is deemed to be satisfied unless the buyer, within a certain number of days of acceptance of the offer, delivers to the seller a copy of the inspection/risk assessment report and a notice listing the LBP identified in the report to which the buyer objects. A copy of the report and notice are also to be delivered to the listing agent. The inspection/risk assessment is performed at buyer's expense.

If the inspection contingency is selected, the buyer must indicate the number of days which the buyer will have in which to have an LBP inspection/risk assessment conducted, receive the written report, decide whether to give notice identifying

objectionable defects, and deliver a copy of the report and the written notice to the seller and listing agent. The buyer should also choose whether the seller will have the right to cure.

Although the buyer's opportunity to conduct an LBP inspection/risk assessment is often referred to in terms of it being a 10-day opportunity, the length of time is negotiable and may be lengthened or shortened by mutual agreement of the buyer and seller. In other words, it is like the inspection contingency in the offer — the parties may allow as many days for the LBP inspection/risk assessment as they see fit. It may be presumed that qualified LBP personnel may be harder to come by than home inspectors, so it may be wise to allow more time than 10 days if LBP contractors are scarce in the local market. Note that the number of days specified runs from the date of acceptance, as that term is defined in the offer to purchase.

The LBP inspection contingency also gives a choice about whether the seller shall have an opportunity to cure. Note that the LBP inspection contingency indicates that if neither "shall" nor "shall not" is struck, the seller will be deemed to have the right to cure. The seller exercises his or her right to cure (1) by delivering to the buyer, within 10 days of receipt of buyer's notice and report, written notice of the seller's election to abate the identified LBP; and (2) by providing the buyer with certification, no later than 3 days prior to closing, that the identified LBP has been abated. The offer becomes null and void if the seller fails to give written notice of his or her intent to abate the identified LBP within the 10 days following seller's receipt of the report and buyer's notice, or if the seller does not have the right to cure.

Buyer's Acknowledgment. The buyer's attention may then be turned to the Buyer's Acknowledgment section of Addendum LS. The buyer is being asked to acknowledge and certify that he or she has received the seller's LBP information and the accompanying reports and records, has received an EPA-approved LBP pamphlet, and was given the opportunity to have an LBP inspection/risk assessment conducted. If these actions have all occurred, the buyer should feel comfortable in signing Addendum LS in the Certification section.

Incorporate Addendum LS in Offer. Addendum LS should be completed in its entirety, signed by the seller, buyer, listing agent and cooperating agent, and incorporated into the offer to purchase. This is done by writing in Addendum LS on line 271 of the residential offer, i.e., "The attached Addendum LS is made part of this Offer."

Presentation of Offer to Seller. When the offer is submitted to the listing broker, all LBP disclosures should have been made to the buyer. The buyer should have received the seller's LBP information, reports and records and an LBP information pamphlet. The buyer should have had the opportunity to incorporate the lead-based paint inspection contingency into the offer. Before the offer goes to the listing agent, it is prudent for the cooperating agent to confirm that all of these LBP compliance measures have been completed.

When the listing agent receives the offer, he or she should also confirm that all of these LBP disclosure rule activities have been completed. These activities must be completed before the seller accepts the offer. If not, the listing agent must advise the seller to not accept the offer until the disclosure activities have been completed

and the buyer has had the opportunity to review the offer and decide whether his or her offer should be amended. There are no specific guidelines stating exactly how much time must be given to the buyer for this purpose. It may be prudent to give the buyer as much time as the buyer needs to become comfortable with the information that has been provided and with the offer he or she is submitting to the seller.

This may be accomplished either by having the seller counter the offer or by permitting the buyer to withdraw and resubmit the offer. The listing agent should first furnish the cooperating agent with the seller's LBP reports and records, if any, and an Addendum LS. These may be attached to the seller's counteroffer. The counteroffer should specify that the attached Addendum LS is to be completed by the buyer and cooperating agent and incorporated into the offer. The seller must understand that this means that the resulting contract may contain an LBP inspection contingency. If the counteroffer's acceptance deadline does not permit sufficient time for the buyer to become comfortable with the LBP disclosures, the buyer may counter back when the buyer is ready. Alternatively, the parties may prefer that the buyer direct that the offer be withdrawn and resubmitted when the buyer is ready.

If the seller does not want to accept offers which include a lead-based inspection contingency, the federal LBP rules do not require that the seller do so. A seller generally cannot be legally compelled to accept a particular offer absent fair housing violations. Once an offer is accepted, however, the seller cannot hinder the buyer in the exercise of his or her contractual rights.

Implementing Inspection Contingency

Once the offer has been accepted, the buyer may proceed with the inspection contingencies included in the offer. The following discussion looks at the type of inspectors which may be used for the lead-based paint inspection contingency, the type of inspection which may be performed, the techniques which may be used to detect LBP, and the abatement measure which may be required.

1. **Certified Inspectors.** The EPA is in the process of developing a federal training and certification program for LBP inspectors and the Wisconsin DHSS is also in the process of developing a state certification program for LBP inspectors. Once these programs are enacted, all LBP inspections and risk assessment will be legally required to be performed by federally certified personnel or contractors certified under a federally authorized state certification program. The federal certification program may be established this fall and the state regulations are expected to become effective Jan. 1, 1997. In the meantime, buyers will want to find competent LBP contractors to perform LBP inspections on the properties they are purchasing.

Information about Wisconsin's LBP training and certification program and a list of LBP contractors can be obtained from the DHSS by calling 608/267-2297 or 608/267-0928. DHSS recommends that buyers hire LBP contractors certified in other states or check the qualifications of any Wisconsin LBP contractor engaged for an LBP inspection. The LBP contractors on the DHSS list are not necessarily endorsed by the DHSS and the department urges that references be checked before a contractor is retained to maximize

satisfactory job performance.

The LBP inspection contingency was drafted to permit the buyer to select a “federal or state certified or other qualified lead-based paint inspector or contractor.” This is broad enough to accommodate the use of non-certified contractors until such time the certification programs are put in place. At that time, the use of non-certified contractors will become illegal, so the reference to other qualified LBP contractors will become irrelevant and will be deleted from future printings of Addendum LS.

2. LBP Detection Techniques. The LBP inspection contingency indicates that either an inspection or risk assessment may be conducted. The federal LBP rules define “inspection” as a surface-by-surface investigation to determine the presence of lead-based paint, followed by a written report of the results. A “risk assessment” is an on-site investigation to determine the existence, severity, nature and location of LBP. This is done by gathering information about the age and history of the house and occupancy by children under age 6, visual inspections, and limited wipe and other sampling and testing of paint and paint dust, followed by a written report of the results.

The only way to know for sure if there is LBP in a home is by testing. There are, however, a few different techniques for detecting the presence of LBP. Paint chip and dust samples from a home may be tested by a qualified laboratory. LBP may also be detected through the use of swabs which are applied to painted surfaces, and through the use of x-ray fluorescence (XRF).

The use of swabs will immediately indicate whether or not LBP is present on a painted surface. They do not, however, indicate the amount of

lead that is present. The standards for “lead-based paint” are very low: the federal standard is .005 lead by weight, and the Wisconsin standard is .006 lead by weight.

More sophisticated results may be obtained through the use of XRF. XRF indicates the percentage of lead present in a painted surface and can indicate what layer of paint on a surface contains the LBP. XRF instruments use a radioactive source for this detection process, so persons using XRF must register with the Radiation Protection Council.

LBP inspectors may differ over which detection device is most useful, and buyers may wish to clarify with the LBP contractors they retain exactly what the extent and cost of the inspections/investigations will be.

Once the LBP inspection/risk assessment has been completed and a written report rendered, the buyer must decide whether to object to any LBP identified in the report. If the buyer does give the seller a list of LBP items to which the buyer objects and a copy of the LBP report, the seller will have control over the situation if the seller has the right to cure. The seller can decide whether to agree to abate all of the identified LBP or to let the offer become null and void. The seller may also wish to amend the offer to delete the LBP inspection contingency and instead agree with the buyer upon a shorter list of LBP abatement activities to be performed.

3. LBP Abatement. Only qualified contractors specializing in lead paint abatement should attempt to remove or minimize a lead hazard. Removal of LBP by persons who are not sufficiently trained and who do not take the proper precautions is dangerous. Lead dust can easily be released into the air during abatement activities.

LBP abatement activities may include the permanent containment or encapsulation of LBP, for instance, by adding sheet rock to rooms. It may also include the removal of lead-based paint and lead-contaminated dust, which may require the replacement of all surfaces and fixtures painted with LBP. This may be an elaborate undertaking, requiring the occupants to leave the premises for several days or even weeks. Lead-contaminated soils may also need to be covered or removed.

Once the federal and state LBP certification programs are enacted, the specific LBP abatement techniques which may be used in a given situation will be regulated and substantially standardized. If the seller does agree to lead abatement activities, he or she should engage a competent or certified (if required at the time) contractor to perform the LBP abatement and render a certification report which may be furnished to the buyer at least 3 days prior to closing.

4. Copies of LBP Inspection Reports. If the buyer does give the seller notice of the identified LBP to which the buyer objects, the LBP inspection contingency requires that a copy of the LBP inspection report also be given to the seller. The contingency also requires that a copy of the report be given to the listing agent. Even if the buyer does not give the notice, the buyer is still required to give the seller and listing broker a copy of the LBP inspection report. This is because the offer to purchase forms provide that the buyer agrees to provide the seller and listing broker with copies of all inspection reports.

Updating Seller’s Disclosures for Subsequent Buyers. Once the seller has any additional LBP inspection reports, they will have to be added to the Seller’s Disclosures section on

Addendum LS for subsequent buyers, and copies of these reports will need to be given to these buyers. This means that the Seller's Disclosures will keep on changing each time a buyer with an accepted offer has an LBP inspection performed. The disclosures will also change if the seller performs LBP abatement activities because the abatement certification report will need to be added to the mix. Thus the listing agent must keep on his or her toes and help the seller keep updating the Seller's Disclosures section as copies of additional inspection/risk assessment reports are received.

Record Keeping. The federal LBP disclosure rules require that agents keep a copy of completed Addenda LS for three years from the closing date. This should not impose any additional burden because s. RL 15.04 requires brokers to retain transaction files for three years from the date of the closing, or three years from the date of the listing for any offers which do not close. Thus the retention of completed Addenda LS should occur naturally.

Transactions Without a Listing and Cooperating Agent. If the transaction involves only one agent, that agent will have to take on the responsibilities of both the listing and cooperating agents as discussed in the preceding sections. This may occur when the listing agent also works with the buyer as a seller's agent, or when the seller is FSBO and the buyer's agent is not paid solely by the buyer. In the latter case, the buyer's agent would want to be sure to give the seller an agency disclosure form, indicating he or she is an agent of the buyer because this buyer's agent is going to end up providing brokerage services to the seller by virtue of the federal LBP law.

Selling Agent Initiation of Addendum LS

The sequence described on pages 2-10 of this *Update* is certainly not the only way the Addendum LS may be handled. If the cooperating agent has learned from the listing agent that the seller has no LBP information and LBP reports and records to disclose, the cooperating agent may wish to initiate the Addendum LS. The Addendum LS may be completed to indicate the seller has no LBP disclosures. After the cooperating agent has given the buyer an EPA-approved LBP information pamphlet and reviewed the Addendum LS with the buyer, the cooperating agent and buyer may sign the Certification section of the Addendum LS and incorporate it into the buyer's offer. A condition of the seller's acceptance of the offer will have to be that the seller and listing agent sign the Certification section of the Addendum LS. If it turns out that the seller does have LBP disclosures, the offer will have to be countered by the seller or withdrawn by the buyer until the disclosures have been properly completed.

Other sequences may also be possible. All that matters is that by the time the offer is accepted, the seller should have made any LBP disclosures; the buyer should have received the LBP information pamphlet; and the Addendum LS should have been completed, signed by the seller, buyer, listing agent and cooperating agent, and incorporated into the offer.

LBP Compliance in Lease Transactions

When a landlord uses the services of rental/leasing agents or property managers in marketing his or her property for rent, those agents have the responsibility of ensuring that the landlord complies with the federal

LBP disclosure rule requirements. A property manager or rental listing agent generally will be best situated to advise the landlord of his or her obligations under the LBP law, and to make sure that the landlord discloses any known LBP and furnishes the tenant with any available LBP records. If there is a cooperating agent (subagent, tenant's agent, etc.), that person is generally best situated to provide the tenant with the LBP hazard information pamphlet, review the required disclosure and acknowledgment attachment or lease provisions with the tenant, and make sure that the required disclosures and acknowledgments are properly signed and made part of the lease. If there is no tenant's agent, however, as will typically be the case, the property manager or rental listing agent (collectively referred to as rental agent) will be left with fulfilling all agent responsibilities under the federal LBP disclosure rules.

Here are some guidelines for the rental agent to follow to assure federal LBP rule compliance in a lease transaction. These guidelines assume the more predominant traditional transaction where only the landlord has an agent. The guidelines also assume a written lease is being used. An LBP disclosure and acknowledgment form, however, must also be completed for verbal leases and rental arrangements.

Establishing the Rental Agent Relationship

The rental agent should inspect the property and complete the WB-37 Exclusive Listing Contract for Lease of Residential Property or property management agreement, and an agency disclosure form, as usual. The following steps must be taken by the rental agent to comply with the federal LBP rules.

1. Determine if the property is

target housing. This may be determined by asking and answering the following questions.

a. Is the property a dwelling unit, that is, an apartment, efficiency, room for rent, single-family home, residential condominium unit, unit in a residential cooperative, etc.?

b. Was the dwelling unit built before 1978? Rental agents may ask the landlord for information about the age of the building or may consult municipal records if the property's age is unknown or in doubt. It may be prudent to obtain some sort of written record for the agent's file to confirm the property's age if there is any doubt or where it is a close call.

If the answers to both of these questions are yes, it is target housing.

c. Is it exempt target housing? Exempt target housing in a rental transaction includes housing for the elderly where at least one initial occupant is at least 62 years old and where there are no resident children under age 6; housing for the disabled where there are no resident children under age 6; and "0-bedroom" dwellings where the living area is not separated from the sleeping area.

d. Is the transaction exempt? Transactions which involve target housing but which are nevertheless exempt include leases of housing found to be lead free, short-term leases of 100 days or less, and lease renewals if the LBP disclosures have previously been given and there is no new information to report.

These exemptions are further discussed in *Legal Update 96.04*. If the housing or transaction falls within an exemption, then compliance with the federal LBP rules is not required. Note that the renewal of a lease in place before the effective date of the

federal LBP rules is not exempt (Addendum LL will be needed for such a renewal) and that a transaction is not exempt simply because the lease is verbal or the arrangement is a month-to-month tenancy. The federal LBP rules will still apply in these cases.

2. Look for painted surfaces in bad condition while inspecting the property.

While a rental agent surely cannot tell whether there is lead-based paint present simply by just looking at it, painted surfaces in poor condition generally constitute a LBP hazard if it turns out it is indeed lead-based paint. Peeling, chipping or cracking paint is a hazard if the paint is lead-based. Also lead dust from friction sources such as windows, door frames and stairs is a hazard if the paint is lead-based. These items should be noted during a property inspection unless it is clear that the property is not target housing or is exempt. These items will be required to be disclosed by the rental agent as potential material adverse facts pursuant to Wis. Admin. Code s. RL 24.07(3) if they are not disclosed by the landlord on Addendum LL.

3. Advise the landlord of his or her obligations under the LBP rules.

If the property is non-exempt target housing, the rental agent must advise the landlord of his or her obligations under the federal LBP rules. The rental agent may produce Addendum LL and use it as the basis for the explanation. The back side of Addendum LL explains the landlord's disclosure requirements, the certification and acknowledgment requirements, and defines several of the important terms used in the rules. After discussing these requirements, the landlord should be urged to read the back of the form. If the agent has advised the landlord of his or her obligations under the federal LBP rules, the rental agent will not be held liable for failing to disclose to the

tenant any LBP information the landlord did not share with the rental agent.

4. **Ask the landlord if he or she has any knowledge of LBP on the property.** Obviously the landlord is unlikely to know for sure that there is LBP present unless it has been previously tested. If the landlord indicates knowledge of LBP, ask the landlord how this is known. The landlord should also be asked whether there are any painted surfaces in bad shape, i.e., chipped or cracked paint, paint dust, etc. This information will be needed for the completion of Addendum LL.

5. Obtain copies of any available LBP records pertaining to the property.

If the landlord indicates that prior testing occurred in the target housing being rented, the landlord must provide copies of all available testing reports and records. This includes LBP records and reports regarding the unit for rent. It also includes reports and records regarding common areas (hallways, playgrounds, etc.) and other residential dwelling units in multifamily target housing, provided that such information is part of a LBP inspection/risk assessment or LBP reduction or abatement in the target housing as a whole.

"Available" is defined to mean in the landlord's possession or reasonably obtainable by the landlord at the time of the disclosure. "Reasonably obtainable" records include records maintained by a separate or outside entity such as a property management company or attorney, and copies of reports retained by the original inspector or risk assessor that would be available to the landlord if the original records were lost or destroyed. Thus the rental agent may end up helping the landlord track down records held by the original inspector if the landlord cannot locate

his or her copies of the reports. The rental agent should check with all companies that did testing.

Failure of the rental agent to make this effort may result in the rental agent being found responsible for failing to ensure compliance. If the test reports and records cannot be found after a reasonable effort, the rental agent should have the landlord disclose that the property was tested and give as much information about the test results as the landlord can remember.

6. Have the landlord complete and sign Addendum LL. The landlord should complete the Landlord's Disclosures section of Addendum LL and sign the addendum at the bottom in the Certification section. The Certification section of the Addendum LL indicates that all signatories are certifying that the information provided by them is true and accurate to the best of their knowledge.

In the Landlord's Disclosures section, the landlord discloses any known LBP information (an attachment may be needed). This should include any information concerning the source of the landlord's knowledge, other than LBP reports and records which should be inserted in this section, and information about the condition of painted surfaces.

7. The rental agent signs Addendum LL. At this point, the rental agent may sign the Addendum LL. The Agent's Acknowledgment section of Addendum LL indicates that the landlord has been informed of the landlord's obligations under the federal LBP rules, and that the rental agent is aware of his or her duty to ensure compliance with the federal LBP law. The rental agent should be in a position where he or she may comfortably certify that this is true to the best of his or her information. A copy of the Addendum LL signed by

the landlord should be left with the landlord and a copy should be retained for the rental agent's file.

Marketing the Rental Property

When marketing the property, the rental agent should decide on the most effective way of informing tenant prospects that the property is target housing. The federal LBP rules do not require that every tenant prospect who attends a showing must be given the LBP disclosures, reports and Addendum LL. Only tenants who enter into accepted leases must receive this information. Since there will be multiple tenant prospects, the rental agent should keep copies of the Addendum LL signed by the landlord, and the accompanying LBP reports and records so that these may be given to tenant prospects.

When rental applications are used, one option may be to make the federal LBP disclosures to tenants who pass the rental screening process, before they are given a lease to sign. If the tenant receives an Addendum LL completed by the landlord and rental agent, the landlord's LBP reports and records and a lead information pamphlet approved by the EPA, is given a chance to review the materials and still wants to rent the unit, everything is then perfectly positioned to proceed with the lease.

On the other hand, the landlord may want the tenant prospect to receive the federal LBP disclosure materials and become comfortable with them before beginning the tenant screening process. If the rental unit has previously passed LBP testing, then it will likely make the most sense to proceed with the rental application and screening process before making the federal LBP disclosures.

The following are the steps that the rental agent will need to take to ensure compliance with the federal LBP rules, whether this is before or after the rental application and tenant screening process.

1. Give the tenant an EPA-approved LBP hazard information pamphlet. This may be the EPA's pamphlet entitled "Protect Your Family From Lead in Your Home." This pamphlet is generally available for purchase for about 50 cents each. Alternatively, the tenant may be given a copy of the pamphlet which will be made available by the WRA.

After negotiations with the Department of Health and Social Services and the EPA, the WRA has concluded that the most feasible approach to providing Wisconsin REALTORS® with an approved pamphlet at an economical rate is to publish a pamphlet substantially like the EPA pamphlet. At the same time, providing Wisconsin county health department and other local contact numbers is also desirable. This will first be done using the equivalent of the EPA pamphlet along with a Wisconsin contact number insert. Later printings will incorporate the Wisconsin contact numbers directly into the pamphlet once it is established that the numbers will be permanent. The WRA expects to have these pamphlets available for purchase in August at a cost of under 30 cents each. Prices will vary depending upon the quantity ordered.

2. Give the tenant Addendum LL and copies of the landlord's LBP reports and records. The tenant should be given a copy of Addendum LL which has been completed by the landlord and signed by the landlord and rental agent. Copies of any LBP reports and records concerning the property should also be given to the tenant.

If the tenant is ready to enter a lease, the rental agent may wish to take the following steps.

Lead Warning Statement. The rental agent should review the Addendum LL with the tenant, starting with the Lead Warning Statement. The rental agent may wish to encourage the tenant to read the statement immediately.

Landlord's Disclosures. The rental agent may next go over the landlord's disclosures of known LBP or paint in poor condition, if any. The rental agent may also give the tenant an overview of any LBP reports and records provided. Specific questions, however, should be directed to the contractor who performed the LBP inspection or risk assessment, or to other qualified professionals.

Tenant's Acknowledgment. The tenant's attention may then be turned to the Tenant's Acknowledgment section of Addendum LL. The tenant is being asked to acknowledge and certify that he or she has received the landlord's LBP information and the accompanying reports and records, and has received an EPA-approved LBP pamphlet. If these actions have occurred, the tenant should feel comfortable in signing Addendum LL in the Certification section. There is no required LBP inspection contingency in rental transactions although a tenant is free to try to negotiate for one.

Entering the Lease. If a tenant is ready to sign the lease, the rental agent's job is to make sure that the tenant has the Addendum LL completed and signed by the landlord, tenant and rental agent, and copies of all LBP reports and records. Addendum LL must then be properly incorporated into or attached to the lease.

When the lease has been signed by the tenant and is submitted to the landlord, all LBP disclosures must have been made to the tenant. These disclosure activities must be completed before the landlord accepts and signs the lease. If not, the rental agent must advise the landlord to not sign the lease until these activities have been completed and the tenant has had the opportunity to reconsider the lease. There are no specific guidelines stating exactly how much time must be given to the tenant for this purpose. It may be prudent to give the tenant as much time as the tenant needs to become comfortable with the information that has been provided and with the lease.

Uncooperative Sellers and Landlords

If at any time the seller or landlord should balk at completing the required LBP disclosure process, the agent working with them may wish to remind them of the penalties which may be imposed for noncompliance. The federal civil penalties for noncompliance can range up to \$10,000 for each violation. Instead of or in addition to the civil penalties, the criminal penalty for those who knowingly or willfully violate the federal LBP disclosure rules can be up to \$10,000 for each violation and imprisonment for up to one year, or both.

The seller or landlord may also be sued for three times the 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-based paint poisoning. Any agents involved, however, cannot be held liable for the seller's or

landlord's failure to disclose LBP if the agent has advised the seller or landlord of their LBP disclosure obligations and the seller or landlord did reveal the LBP information, reports and records to the agent.

Conclusion

The WRA's Addendum LS and Addendum LL have been developed for REALTORS® to use to ensure compliance with the federal LBP rules. These addenda serve as self-contained summaries of the federal LBP disclosure rules and checklists 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 or lease before acceptance, LBP disclosure compliance will be achieved.

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