Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

December 2007

Table of Contents

Chapter 1: Introduction 1

Chapter 2: Summary of Rule and Requirement 5

Chapter 3: Responsible Party / Appropriate Respondent 7

Chapter 4: Determining the Level of Action 8

Chapter 5: Calculating the Proposed Penalty 11

Chapter 6: Determining the Number of Violations 15

Chapter 7: Adjustment Factors 17

Appendix A Responsible Party Examples 24

Appendix B Penalty Matrices 27

Appendix C Internet References for Policy Documents 31

Appendix D Examples of Potential Supplemental Environmental Projects 33

Chapter 1: Introduction

The revised *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* supersedes the February 2000 *Section 1018 -- Disclosure Rule Enforcement Response Policy*. It sets forth guidelines for the Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount, in settlement or in litigation, for violations of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992. The revisions in this policy take into account an increase in the maximum statutory penalty required by the Debt Collection Improvement Act of 1996, recent case law developments and other relevant EPA policies that impact enforcement actions.

The purpose of this Enforcement Response and Penalty Policy (ERPP) is to provide predictable and consistent enforcement responses and penalty amounts for violations of Section 1018, yet retain flexibility to allow for individual facts and circumstances of a particular case.

This policy is not binding on the Agency. 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, nor do they impose requirements on EPA staff or the regulated community. 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. Further, this document is not intended to limit the discretion of EPA staff. Enforcement staff should continue to make appropriate case-by-case enforcement judgments guided, but not restricted or limited, by the policies contained in this document.

I. Background

The Centers for Disease Control and Prevention (CDC) has established the elevated blood-lead level (EBL) of 10 micrograms per deciliter (μg/dL) to be a level of concern for children. In the early 1990s the National Health and Nutrition Examination Survey (NHANES) data indicated that there were approximately 890,000 American children with levels greater than 10 μg/dL. In addition, minority and low-income children were disproportionately affected. Lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems; in severe cases it may lead to seizures, coma and death. NHANES data further indicated that in as many as 4 million homes in the United States, children's health was endangered by lead-based paint and/or lead-based paint hazards. In response to this national crisis, Congress enacted *Title X: Residential Lead-Based Paint Hazard Reduction Act of 1992*, 42 United States Code (USC) Section 4851 (Title X).[1]

[1] The CDC's recent statement on *Preventing Lead Poisoning in Young Children*, August 2005, recognized that recent studies indicate that additional evidence exists of adverse health effects in children at blood lead levels of less than 10 μg/dL. However, the CDC has determined that it will not lower the level of concern at this time.

There has been significant progress in reducing the number of EBL children, as documented by the most recent NHANES data showing approximately 310,000 EBL children. CDC's Advisory Committee on Childhood Lead Poisoning Prevention updated its recommendations in 2005 and called for the nation to focus on primary prevention of childhood lead poisoning. Lead in housing remains the most significant source of lead exposure for young children. The CDC recommends the control of lead-based paint contaminated house dust and soil and poorly maintained lead-based paint in housing as the first essential element of primary prevention of lead exposure for young children.[2] Elevated blood-lead levels are totally preventable, and such prevention remains a national concern.

Pursuant to Section 1018 of Title X, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD) promulgated joint regulations for the disclosure of lead-based paint and/or lead-based paint hazards in pre-1978 housing (target housing) offered for sale or lease. These regulations were published on March 6, 1996, at 61 Fed. Reg. 9064, and are codified at Title 40 of the Code of Federal Regulations (CFR) Part 745, Subpart F and at 24 CFR Part 35, Subpart H (Disclosure Rule).

II. Enforcement Response and Penalty Policy Applicability

This *Disclosure Rule Enforcement Response and Penalty Policy* is immediately applicable and should be used to inform the appropriate enforcement response and to guide the calculation of any proposed penalties in administrative enforcement actions concerning violations of the Disclosure Rule.

III. Applicability to Federal Facilities

As discussed 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.

Pursuant to Section 1018(b)(5), a violation of the Disclosure Rule is a prohibited act under Section 409 of TSCA and is subject to EPA enforcement authority under Section 16 of TSCA. Section 408 of TSCA, 15 USC § 2688, subjects each department, agency, and instrumentality of the 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

[2] *Preventing Lead Poisoning in Young Children*, A Statement by the Centers for Disease Control and Prevention, Atlanta: CDC; 2005

activities, and lead-based paint hazards. Therefore, federal facilities are subject to the Disclosure Rule requirements.

In proposing penalties against federal agencies, EPA will consider the *Disclosure Rule Enforcement Response and Penalty Policy*. Before a penalty order becomes final, Section 16(a)(2) of TSCA, 15 USC § 2615(a)(2), 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. The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* at 40 CFR Part 22 set forth EPA's general rules of administrative practice governing the assessment of administrative penalties and require that, before a final order of the U.S. EPA's 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 may request a conference with the Administrator. 40 CFR §22.31(e).

Finally, although federal agencies are subject to the lead disclosure requirements, there may be unique complexities associated with cases against federal agencies. Thus, because of these complexities and because such cases may have major inter-agency implications that rise to a level of national attention, Regions generally should notify and consult with the Federal Facilities Enforcement Office prior to bringing an enforcement action. *See Appendix C* for a link to "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases".

IV. Structure of This Document

This document consists of two policies to guide civil enforcement actions for Disclosure Rule violations. The enforcement response policy in Chapters 3 and 4 addresses violations of the Disclosure Rule and provides guidelines for use in determining the appropriate enforcement response to such violations. The penalty policy in Chapters 5, 6, and 7 provides rational, consistent and equitable penalty calculation methodologies and guidance for use in applying the TSCA Section 16, 15 USC § 2615, statutory penalty factors to particular cases. The penalty policy sets forth the Agency's policy and internal guidelines for determining penalty amounts that: (1) should be sought in administrative actions filed under TSCA[3] and (2) would be acceptable in settlement of administrative and judicial enforcement actions under TSCA. Together these policies are known as the *Disclosure Rule Enforcement Response and Penalty Policy* (*Disclosure Rule ERPP*).

Violations of the Disclosure Rule are subject to civil penalties under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 USC § 2615(a). Section 1018(b)(5) of Title X specifically states:

[3] This Policy does not limit the penalty amount that may be sought; the United States may, in its discretion, continue to request a civil penalty up to the statutory maximum amount, and may litigate for the maximum amount justifiable on the facts of the case.

> *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 be no more than $10,000.*[4]

Therefore, violations of the Disclosure Rule are prohibited acts under Section 409 of TSCA, 15 USC § 2689. Section 16 of TSCA states that any person who violates a provision of Section 409 shall be liable to the United States for a civil penalty.

[4] The maximum penalty amount was adjusted to $11,000 per violation under the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 CFR Part 19 (1998), which increased, by ten percent, the civil penalties which can be assessed for violations occurring on or after July 28, 1997. Subsequent amendments to the *Civil Monetary Penalty Inflation Adjustment Rule* further provide for a 17.23% penalty increase for violations occurring on or after March 15, 2004, but the rule did not adjust the statutory maximum penalty amount which is still $11,000 per violation at this time. 40 CFR Part 19 (2004)

Chapter 2: Summary of Rule and Requirements

The purpose of the Disclosure Rule is to ensure that individuals and families receive the information necessary to protect themselves and their families from lead-based paint and/or lead-based paint hazards. This information will help families and individuals make informed housing decisions to reduce their risk of exposure to lead-based paint and lead-based paint hazards.

The Disclosure Rule requires sellers, lessors and agents to comply with certain requirements when selling or leasing housing built before 1978 (target housing). For purposes of the Disclosure Rule, "seller" is defined as any entity that transfers legal title to target housing, in whole or in part. The Disclosure Rule defines "lessor" as any entity that offers target housing for lease, rent, or sublease. "Purchaser" is defined as an entity that enters into an agreement to purchase an interest in target housing under the Disclosure Rule. "Lessee" is defined as any entity that enters into an agreement to lease, rent, or sublease target housing. Finally, the Disclosure Rule defines "agent" as any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, to sell 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, certain requirements must be met. These requirements include the following:

- Sellers and lessors must provide purchasers and lessees with an EPA-approved lead hazard information pamphlet;
- Sellers and lessors must disclose the presence of any known lead-based paint and/or lead-based paint hazards to the purchasers and lessees and to any agent;
- Sellers and lessors must provide purchasers and 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 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, unless the parties mutually agree, in writing, upon a different period of time or the purchaser waives, in writing, the opportunity to conduct the risk assessment or inspection;
- Sellers and lessors must disclose information pertaining to lead-based paint and/or lead-based paint hazards as an attachment to a contract to sell target housing or as an attachment or within a contract to lease target housing in accordance with the Disclosure Rule requirements;
- Sellers, lessors and agents must retain a copy of each Disclosure Rule statement and certification for at least three years from completion of the transaction; and
- Each agent involved in any transaction to sell or lease target housing must ensure compliance with all requirements of the Disclosure Rule.

The Disclosure Rule does not apply to the following transactions:

- Sales of target housing at foreclosure;
- Leases of target housing that has been found to be lead-based paint free by an inspector certified under the Federal program or under a federally accredited state or tribal certification program;
- Short term leases of 100 days or less, where no lease renewal or extension can occur;
- Lease renewals where the lessor previously met all disclosure requirements and the information pertaining to lead-based paint and/or lead-based paint hazards has not changed;
- The sale or lease of 0-bedroom dwellings; and
- The sale or lease of housing for the elderly or persons with disabilities (unless any child under six (6) years of age resides or is expected to reside in such target housing).

Chapter 3: 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 the seller, lessor, or the agent personally. The Disclosure Rule also identifies the affirmative duty of the sellers and lessors to disclose to their agents any known lead-based paint and/or lead-based paint hazards in target housing.

In determining the appropriate respondent(s) for the enforcement response, consideration should be given to the person(s) / entity(ies) with direct control over disclosure activities.

See *Appendix A* for examples of common responsible parties.

Chapter 4: Determining the Level of Action

When evidence supports an enforcement action, the Region should determine, using the criteria set forth below, which of the following responses is appropriate: a notice of noncompliance; a civil administrative complaint; a criminal referral; injunctive relief; or some combination of these actions.

I. Notices of Noncompliance

On a case-by-case basis EPA may determine that the issuance of a notice of noncompliance (NON) is the most appropriate response. Facts and circumstances will vary, but this enforcement response may be used when a violator has substantially complied with the requirements of the Disclosure Rule and timely disclosure has been made. For example, if an agent provided a purchaser with the 10-day opportunity to conduct an inspection and a copy of the lead pamphlet but failed to sign the disclosure form, a NON typically is the appropriate enforcement response. In addition, if the proposed penalty is $1,000 or less following the application of downward penalty adjustment factors provided in this policy, EPA may issue a NON in lieu of seeking a penalty.

A NON should require a violator to take corrective action to comply with the Disclosure Rule. The type and nature of the corrective action will depend upon the specific violation(s). The NON also may require that action be taken by a certain date and that proof of its completion be submitted promptly to EPA.

II. Civil Administrative Complaints

A civil administrative complaint generally is the appropriate response to violations of the Disclosure Rule. Violators may be subject to civil penalties 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.

A civil administrative complaint may contain a proposed penalty that has been calculated pursuant to this policy. Alternatively, the complaint may specify the number of violations for which a penalty is sought, a brief explanation of the severity of each violation alleged, and a recitation of the statutory penalty authority applicable for each violation in the complaint. 40 CFR 22.14(a)(4). This "notice pleading" approach would not eliminate the need for EPA to specify a proposed penalty and explain how the proposed penalty was calculated in accordance with Section 16 of TSCA, but would postpone such requirement until after the filing of

prehearing information exchanges, at which time each party shall have exchanged all factual information considered relevant to the assessment of a penalty. 40 CFR 22.19(a)(4).

An administrative action should result in an enforceable agreement and the assessment of a penalty. Before a penalty order becomes final, Section 16(a)(2)(A) of TSCA, 15 USC § 2615(a)(2)(A), requires the Administrator to provide each respondent with notice and an opportunity for a formal hearing in accordance with the Administrative Procedures Act. EPA's general rules of administrative practice governing the assessment of administrative penalties are set forth in 40 CFR Part 22, entitled *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.*

III. Criminal Sanctions

In addition to being subject to the various types of civil sanctions, any person who knowingly or willfully violates any provision of Section 409 of TSCA is subject to misdemeanor criminal sanctions. *See*, Section 16(b) of TSCA, 15 USC § 2615(b). These sanctions include imprisonment for not more than one year, as well as a criminal fine of not more than $25,000 for each day of violation.[5] Disclosure Rule violations which are especially egregious in nature – in terms of the threat of harm, or the level of culpability, or both – should be brought to the attention of EPA's Criminal Investigation Division. This Division will determine whether to exercise its discretion to pursue a criminal investigation and, where appropriate, to refer the matter to the United States Department of Justice (DOJ) for a prosecutorial determination.

IV. Injunctive Relief

The EPA may obtain injunctive relief by requesting the legal support of DOJ. DOJ may make an application for injunctive relief in U.S. district court under TSCA Section 17(a), 15 USC § 2616(a), to direct a violator to comply with the Disclosure Rule. In addition to requesting such relief, DOJ, on EPA's behalf, also may request 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 hazards in the target housing.

V. Multiple Remedies

There may be circumstances where more than one enforcement response is appropriate.

> **Criminal Sanctions:** The law is well settled that simultaneous civil and criminal enforcement proceedings are legally permissible. The Regions may conduct parallel proceedings where appropriate.

[5] As modified by the Alternative Fines Act, 18 USC § 3571, an individual could be fined up to $100,000 for a violation that does not result in death, or an amount calculated according to the loss to a victim or the gain by the defendant, whichever is greater. Organizations may be fined up to $200,000 per count.

Civil Administrative Penalty and Injunctive Relief: There may be instances in which the concurrent filing of a civil administrative complaint and a request for injunctive relief is appropriate.

The use of multiple responses depends on the facts and circumstances of each case.

Chapter 5: Calculating the Proposed Penalty

In determining the amount of any civil penalty for violations of the Disclosure Rule, Section 16 of TSCA requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations alleged and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require (*i.e.*, the "TSCA statutory penalty factors"). In developing a proposed penalty, EPA will take into account the particular facts and circumstances of each case, with specific reference to the TSCA statutory penalty factors. This *ERPP* follows the general framework described in EPA's *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) and includes an analysis of the TSCA statutory penalty factors, as well as guidance on their application to particular Disclosure Rule violations. In this manner, this *ERPP* provides a rational, consistent and equitable penalty calculation methodology for applying the TSCA statutory penalty factors to Disclosure Rule violations in civil enforcement cases. *See Appendix C* for a link to the TSCA Civil Penalty Guidelines.

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. *See Appendix B*.

Once the gravity-based penalty has been determined, upward or downward adjustments may be made to that penalty amount by considering other factors, including the following:

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

These adjustments are discussed in more detail in Chapter 7.

1. Nature

The TSCA Civil Penalty Guidelines discuss the "nature" of the violation as the essential character of the violation and incorporate the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature. The requirements of

40 CFR Part 745, Subpart F, are most appropriately characterized as "hazard assessment" in nature. The Disclosure Rule requirements are designed to provide potential purchasers and 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 and/or lead-based paint hazards in the target housing they might purchase or lease. This information is vital to purchasers and lessees to make an informed decision about whether to reside in target housing because of the potential risk to all inhabitants and particularly to young children and/or pregnant women residing in that target housing. 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 gravity-based penalty matrix in *Appendix B*.

II. 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 and/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 and, consequently, the greater the likelihood of harm due to exposure to lead-based paint and/or lead-based paint hazards.

The following system ranks potential violations using six levels that factor in compliance with the disclosure requirements and the level of potential harm associated with the purchaser's or lessee's lack of knowledge of lead-based paint and/or lead-based paint hazards in the target housing. For purposes of this penalty policy, the specific violations of the Disclosure Rule have been characterized as follows:

Levels 1 and 2:	Violations having a high probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.
Levels 3 and 4:	Violations having a medium probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.
Levels 5 and 6:	Violations having a low probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.

III. Extent

The term "extent" is used to consider the degree, range, or scope of the violation's potential for harm. 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/or 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 provide the following definitions for the three extent categories:

Major:	Potential for "serious" damage to human health or the environment.
Significant:	Potential for "significant" 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 on two measurable facts:

- the age of any children who live in the target housing; and
- whether a pregnant woman lives in the target housing.

Age of child(ren) living in target housing: Any individual can be adversely affected by the presence of lead-based paint and/or lead-based paint hazards in target housing. The most serious reactions may include nausea, vomiting, seizures, coma or death as a result of lead poisoning. Children under the age of six are most likely to be adversely affected and to exhibit other long-term effects of exposure to lead, based on habits (particularly hand-to-mouth activity) and vulnerability due to their continuing physical development. 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 individual residing in the target housing at the time the violation occurred or the youngest individual in the family that is purchasing or leasing the target housing.

If complainant knows or has reason to believe that a child under the age of six is present, then for purposes of proposing a gravity-based penalty, the major extent category may be used. Where the age of the youngest individual is not known, or a respondent is able to demonstrate to EPA's satisfaction that the youngest individual residing in or to be residing in the target housing at the time of the violation was at least six years of age and less than 18 years of age, then EPA may use a significant extent factor. Where a respondent is able to demonstrate to EPA's satisfaction that no individuals younger than eighteen years of age were residing in or to be residing in the target housing at the time of the violation, then EPA may use a minor extent factor.

Pregnant women living in target housing: Pregnant women are also very susceptible to the dangers of lead-based paint and/or lead-based paint hazards. Lead exposure before or during pregnancy can alter fetal development and cause miscarriages. If EPA determines that a pregnant woman resided in or was purchasing/leasing the target housing at the time violation occurred, then a major extent is appropriate.

IV. Economic Benefit of Noncompliance

A seller, lessor or agent who has violated the Disclosure Rule may not profit from his/her violative acts. Based on the Agency's 1984 Policy on Civil Penalties, the Agency should eliminate economic incentives for noncompliance by recapturing any significant economic benefit of noncompliance that accrues to a violator from noncompliance with the law. *See Appendix C for a link to this policy.* If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to consider economic benefit. Economic benefit can result from a violator delaying or avoiding compliance costs, or when a violator achieves an illegal competitive advantage through its noncompliance. The compliance costs per unit to comply with the Disclosure Rule are generally low, and economic benefit of noncompliance is not usually included in proposed penalties. However, on a case-by-case basis EPA may determine that an economic advantage has been gained and a penalty for economic benefit should be sought.[6]

[6] Section 1018 of Title X also allows the purchaser or lessee to bring a civil action for damages and the court may award treble damages, court costs, reasonable attorney fees, and expert witness fees if that party prevails.

Chapter 6: Determining the Number of Violations

Each requirement of the Disclosure Rule is a separate and distinct requirement and a failure to comply with any requirement is a violation of the Disclosure Rule. In order to determine whether a violation of the Disclosure Rule has occurred, the applicable requirements must be reviewed to determine which regulatory provisions have been violated. For example, each lessor who is leasing target housing must comply with each of the Disclosure Rule requirements of 40 CFR §§ 745.107(a), 745.113(b) and § 745.113(c) including:

- Provide the lessee with an EPA-approved lead hazard information/pamphlet;
- Disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards;
- Disclose to each agent the 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 and/or lead-based paint hazards;
- Provide to the lessee any available records or reports pertaining to lead-based paint and/or lead-based paint hazards in the target housing;
- Include, as an attachment or within each contract to lease target housing, the Lead Warning Statement;
- Include, as an attachment or within each contract to lease target housing, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of lead-based paint and/or lead-based paint hazards;
- Include, as an attachment or within each contract to lease target housing, a list of any records or reports available to the lessor that pertain to lead-based paint and/or lead-based paint hazards or indicate that no such records or reports are available;
- Include, as an attachment or within each contract to lease, a statement by the lessee affirming receipt of the required information;
- Include, as an attachment or within each contract to lease, a statement by any agent(s) involved in the transaction to lease target housing that such agent(s) has informed the lessor of the lessor's obligations and that the agent(s) is aware of his/her duty to ensure compliance;
- Include, as an attachment or within each contract to lease target housing, signatures and dates of the lessor, agent, and lessee certifying to the accuracy of their statements; and
- Retain a copy of the completed disclosure records for no less than three years from the commencement date of the lease.

Each seller must comply with each of the Disclosure Rule requirements of 40 CFR §§ 745.107(a), 745.113(a) and 745.113(c), which are similar to the requirements for lessors except that the seller must include the disclosure information as an attachment and does not have the option to include the disclosure information within the contract to sell target housing. The seller must also comply with 40 CFR § 745.110, which requires the seller to give the purchaser an opportunity to conduct an inspection or a risk assessment.

Chapter 6: Determining the Number of Violations

Each agent is required by 40 CFR § 745.115(a) to inform the seller or lessor of his/her obligations under 40 CFR §§ 745.107, 745.110, and 745.113; and to ensure that the seller or lessor has performed all activities under these sections, or to personally ensure such compliance. Agents, like sellers and lessors, are required by 40 CFR § 745.113(c) to retain records of sales and lease transactions for three years.

For each transaction reviewed, there may be evidence that a seller, lessor and/or agent has violated one or more of the applicable requirements. After identifying which violations are appropriate to pursue for an individual real estate transaction, based on the applicable regulatory requirements, the next step is to determine the number of real estate transactions in which violations occurred. For purposes of this policy, the term "real estate transaction" refers to those business dealings that result in an agreement between either a lessor/agent and a lessee or a seller/agent and purchaser for target housing. Each real estate transaction is a "stand alone" transaction; therefore, the penalty for each violation found in each individual transaction should be assessed separately. The number of lease agreements or sales contracts reviewed determines the number of real estate transactions involved in a particular case.

For example, if a lessor owns eight target housing units in an apartment building and EPA has evidence that the lessor fails to comply with the Disclosure Rule when leasing each of these units, the lessor generally should be held liable for violating the applicable Disclosure Rule requirements in each of the eight transactions. When the civil administrative complaint is filed against the lessor, all eight transactions should be included in the same complaint. In this case, the total gravity-based penalty would be the sum of the penalties for violations of all applicable requirements for each of the eight transactions.

Chapter 7: Adjustment Factors

Section 16(a)(2)(B) of TSCA, 15 USC § 2615(a)(2)(B), describes the factors that EPA must consider in determining the amount of the civil penalty. As discussed in Chapter 5, EPA must consider the nature, circumstances, extent, and gravity of the violation. With respect to the violator, EPA must consider: the ability to pay/ability to continue to do business; any history of prior such violations; the degree of culpability; and other factors as justice may require.[7] Sections IV and V of this chapter include brief discussions of adjustments for supplemental environmental projects and voluntary self-disclosure that are available under other EPA policies.

EPA ordinarily should make all appropriate upward adjustments of the penalty amount prior to issuance of the proposed penalty, while downward adjustments generally should not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on the respondent. Unless otherwise noted these factors may be considered either during settlement negotiations or litigation.

1. 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 amount of the penalty. Absent 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 Civil Penalty Guidelines state that the EPA generally will not request penalties that are clearly beyond the financial means of the violator.

To determine the amount of the proposed penalty in relation to a person's ability to pay, the case team should review publicly available information, such as 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 the amount of a penalty for a violator when financial information is not publicly available, 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 offer insight regarding the violator's ability to pay the penalty.

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

- The last three to five years of tax returns;
- Balance sheets;
- Income statements;
- Statements of changes in financial position;
- Statement of operations;

[7] Under unusual circumstances there may be other factors not identified herein that must be considered to reach a just resolution.

- Information on business and corporate structure;
- Retained earnings statements;
- Loan applications, financing agreements, security agreements;
- Annual and quarterly reports to shareholders and the SEC, including 10K reports; and
- Statements of assets and liabilities.

In appropriate circumstances EPA may seek a penalty that might prevent a violator 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) has been ineffective.

II. History of Prior Violations

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

For the purpose of this policy, EPA interprets "prior violations" to mean any prior violation(s) of the Disclosure Rule. The following guidelines apply in evaluating the history of such violations:

(1) To constitute a prior violation: (a) the prior violation should have resulted in a consent agreement and final order (CAFO), consent decree, default judgment, non-consensual civil judgment or criminal conviction; and (b) the resulting order / judgment / conviction should have been entered or executed within five calendar years prior to the date the subsequent violation occurred. Receipt of payment made to the U.S. Treasury can be used as evidence constituting a prior violation, regardless of whether a respondent admitted to the violation and/or entered into a CAFO. Issuance of a Notice of Noncompliance does not constitute a prior violation for purposes of this policy.

(2) Two or more corporations or business entities owned by, or affiliated with, the same parent corporation or business entity may not necessarily affect 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. 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 applies to all of its subsidiaries. The history of violation for a wholly-owned subsidiary will apply to the parent corporation.

III. Degree of Culpability

This factor may be used only to raise a penalty. TSCA is a strict liability statute for civil actions, so culpability is irrelevant to the determination of legal liability. However, this does not render the violator's culpability irrelevant in assessing an appropriate penalty. Knowing or willful violations generally reflect an increased culpability on the part of the violator and may even give rise to criminal liability. The culpability of the violator should be reflected in the amount of the penalty, which may be increased by up to 25% for this factor.

In assessing the degree of culpability, all of the following points should be considered:

- the degree of control the violator had over the events constituting the violation;
- any actual knowledge of the presence of lead-based paint and/or lead-based paint hazards in the target housing being leased or sold;
- the level of sophistication of the violator in dealing with compliance issues; and
- the extent to which the violator knew of the legal requirement that was violated (for example, did the violator receive a NON or was the requirement to disclose information pertaining to lead-based paint and/or lead-based paint hazards contained in an abatement order received by the violator).

IV. 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 respondent is not otherwise legally required to perform. SEPs are only available in negotiated settlements.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform the proposed SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The SEP Policy, effective May 1, 1998, defines categories of projects that may qualify as SEPs and establishes procedures for calculating the cost of the SEP and the percentage of that cost which may be applied as a mitigating factor in determining an appropriate settlement amount. *See Appendix C* for links on EPA's website to the current version of the SEP Policy and the November 23, 2004 memo entitled "Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases". EPA should ensure that the inclusion of any SEP in settlement of an enforcement action is consistent with the SEP Policy in effect at the time of the settlement. Examples of potential SEPs are listed in *Appendix D*.

V. Voluntary Disclosure of Violations before an Inspection, Investigation, or Tip / Complaint

The civil penalties that are calculated on the basis of the factors in Chapter 5 of this policy may be reduced or eliminated in negotiated settlements if the violator voluntarily discloses the violations to EPA before EPA receives any information about the violation or initiates an inspection or investigation.

A. Audit Policy

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: Discovery, Disclosure, Correction and Prevention of Violations,* 65 Fed. Reg. 19618, April 11, 2000 (Audit Policy) may be eligible for a reduction of up to 100% of the gravity-based penalty if all the criteria established in the Audit Policy are met. *See Appendix C* for a link to the Audit Policy. Reference should be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

B. Small Business Policy

A business with fewer than 100 employees also may be eligible for elimination of the entire gravity-based penalty under the *EPA's Policy on Compliance Incentives for Small Business* (Small Business Policy) (June 10, 1996). Under the Small Business Policy, a business with fewer than 100 employees is eligible for elimination of the penalty if the violations were discovered as a result of the violator's participation in the compliance assistance program or the conduct of a voluntary self-audit and the violator meets all the criteria listed in the Small Business Policy. *See Appendix C* for a link to the Small Business Policy. Reference should be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

C. Self-Disclosure

If a violator self-discloses a violation of the Disclosure Rule but does not qualify for consideration under either the Audit Policy or the Small Business Policy, the proposed civil penalty amount may still be reduced for such voluntary disclosure. To encourage voluntary disclosure of Disclosure Rule violations, EPA may make a penalty reduction of up to 25%. An additional penalty reduction up to 25% (for a total of up to a 50% reduction) may be given to those violators who report the potential violation to EPA within 30 days of discovery.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the complaint.

VI. Other Unique Factors

This policy allows an adjustment in settlement for other factors that may arise on a case-by-case basis.

Chapter 7: Adjustment Factors

A. Potential for Harm Due to Risk of Exposure

EPA may mitigate the proposed penalty based on information regarding the potential risk of exposure to lead-based paint and/or lead-based paint hazards in the target housing where the violation(s) allegedly occurred.

(1). No Known Risk of Exposure

EPA may adjust the proposed penalty downward by up to 95% if the violator provides EPA with appropriate documentation (such as reports of lead inspections conducted in accordance with HUD Guidelines for Assessment of Lead-Based Paint and Lead-Based Paint Hazards in Target Housing) that clearly demonstrates that the target housing is found by a certified inspector to have been lead-based paint free at the time of the alleged violation.[8] *See Appendix C* for a link to the HUD Guidelines.

(2). Reduced Risk of Exposure

In the absence of evidence of lead-based paint hazards, including soil and/or dust lead hazards, EPA may adjust the proposed penalty downward if the violator provides appropriate documentation of a reduced risk of exposure.[9] The maximum penalty reductions discussed below generally will be available only for those properties where a lead paint risk assessment has documented that there are no lead-based paint hazards.

EPA may adjust the proposed penalty downward by up to 50% if the violator provides documentation that clearly demonstrates that the target housing was interior lead-based paint free[10] in accordance with applicable state and/or local requirements at the time the alleged violation occurred. Where state/local requirements allow for further subcategories, such as lead-based paint free apartment units without lead-based paint free certification in common areas, then the amount of penalty reduction will be less than 50%.

EPA may adjust the proposed penalty downward by up to 40% if the violator provides documentation that clearly demonstrates that a significant potential source of lead-based paint hazards in the target housing was removed prior to the alleged violations (e.g., windows including window frames were replaced, thereby eliminating lead-based paint on a friction surface).

---

[8] If the lead-based paint free certification occurred before the date of the lease transaction, the transaction would have been exempt from the regulation. If the lead-based paint free certification occurred prior to the date of a sales transaction, the regulatory requirement to disclose still would have applied.

[9] If the lead-based paint free certification occurred before the date of the lease transaction, the transaction would have been exempt from the regulation. If the lead-based paint free certification occurred prior to the date of a sales transaction, the regulatory requirement to disclose still would have applied.

[10] The term interior lead-based paint free refers to the entire interior including common areas.

EPA may adjust the proposed penalty downward by up to 25% if the violator provides documentation that clearly demonstrates that the target housing was free of lead-based paint hazards at the time the alleged violation occurred (e.g., encapsulation was done or no lead-based paint hazards were found in a hazard assessment done in accordance with all applicable federal, state and local requirements). For each year that elapsed between the time at which the evidence demonstrated that the target housing was free of lead-based paint hazards and the occurrence of the alleged violation, the amount of the adjustment generally will decrease by approximately 5%, so that generally there will be no downward penalty adjustment for hazard reduction after five years.

The overall amount of penalty reduction given for reduced risk will be determined on a case-by-case basis and will depend on a number of variables, including, but not limited to: the scope of work; how the work was conducted (e.g., were lead safe work practices used) and financed; the timing, permanence, demonstrated effectiveness, and actual outcome of the risk reduction; and requirements of federal, state, and local laws, including pre-existing enforcement actions. In order to determine whether an activity presents a reduced risk of exposure, EPA may require additional documentation and/or analytical sampling by the violator, such as clearance testing.

B. Litigation Risk

When developing its settlement position, complainant should evaluate every penalty with a view toward the potential for litigation and attempt to ascertain the maximum civil penalty the court or administrative law judge is likely to award if the case proceeds to hearing or trial. The complainant should take into account, inter alia, the inherent strength of the case and the potential strength of the violator's equitable and legal defenses.[11]

Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Complainant's assessment of these litigation considerations. The extent of the adjustments will depend on the specific litigation considerations presented in any particular case. EPA should still obtain a penalty sufficient to remove any economic incentive for violating applicable TSCA requirements. The memorandum signed by James Strock on August 9, 1990, "Documenting Penalty Calculations and Justifications of EPA Enforcement Actions," discusses further the requirements for legal and factual "litigation risk" analyses. See *Appendix C* for a link to this memorandum.

C. Attitude

In cases where a settlement is negotiated prior to a hearing, after other factors have been applied as appropriate, EPA may reduce the resulting adjusted proposed civil penalty by an additional amount of up to 30% for attitude, if the circumstances warrant. In addition to creating an incentive for cooperative behavior during the compliance evaluation and

[11] The resource outlay involved in litigating a case should not be a determining factor in adjusting a penalty to avoid litigation, but may be considered in addition to such other factors as may exist.

enforcement process, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. The attitude adjustment has three components: (1) cooperation; (2) immediate steps taken to comply with the Disclosure Rule; and (3) early settlement.

(1). EPA may reduce the adjusted proposed penalty up to 10% based on a respondent's cooperation throughout the entire compliance monitoring, case development, and settlement process.
(2). EPA may also reduce the adjusted proposed 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.
(3). EPA may reduce the adjusted proposed penalty up to 10% if the case is settled before the filing of pre-hearing exchange documents.

Appendices

Appendix A Responsible Party Examples

This appendix gives examples of parties who may meet the regulatory definition of agent[12] and therefore need to comply with the Disclosure Rule. This is not intended to be a complete or exhaustive list.

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 sale 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 may be agents under the Disclosure Rule, and as such would be responsible for ensuring compliance with the Disclosure Rule.

Where an agency is the agent, the Disclosure Rule requirement for signature of an agent may be satisfied by a signature from any sales associate and/or broker who is in a contractual relationship with the seller or lessor for the purpose of selling or leasing target housing.

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 their commissions by the seller. The listing and selling real estate agencies generally have sales associates who share their sales commission with the real estate agency and all may be agents in a sale or lease of target housing.

Buyer's Agent: Any representative compensated solely by the purchaser is not an agent for the purposes of the Disclosure Rule.

Contract Service Provider: If 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, and one responsibility of the contract service provider is to ensure that all the proper documents are used, completed and signed, the contract service provider is an agent and is responsible for ensuring compliance with the Disclosure Rule.

Property Management Firm: Where a property management firm enters into a contract with a seller or lessor for the purpose of selling or leasing target housing and where the firm's duties include ensuring that the parties properly execute all sales and leases, the property management firm may be an agent for purposes of the Disclosure Rule.

---

[12] *Agent* means any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. This term does not apply to purchasers or any purchaser's representative who receives all compensation from the purchaser.

Resident Manager: Where a resident manager is an independent contractor who has entered into a contract with a seller or lessor for the purpose of selling or leasing target housing and the duties of the resident manager include ensuring that the parties properly execute all sales and leases, then the resident manager is an agent for the purposes of the Disclosure Rule.

Locator Service: An entity or individual that locates target housing for a lessee and neither contracts with nor is in any way compensated by the lessor is not an agent for the purposes of the Disclosure Rule.

Appendix B Penalty Matrices

Circumstance Level	Disclosure Rule Violation
Components of Full Disclosure	
Level 1	Seller, Lessor, and Agent Requirement: Failure to provide purchaser or lessee EPA-approved lead hazard information/pamphlet pursuant to 40 CFR § 745.107(a)(1)
Level 1	Seller, Lessor, and Agent Requirement: Failure to disclose to purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 CFR § 745.107(a)(2)
Level 1	Seller and Lessor Requirement: Failure to disclose to each agent the 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 and/or lead-based paint hazards pursuant to 40 CFR § 745.107(a)(3)
Level 1	Seller, Lessor, and Agent Requirement: Failure to provide 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 pursuant to 40 CFR § 745.107(a)(4)
Warning Statements	
Level 2	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, the Lead Warning Statement pursuant to 40 CFR § 745.113(a)(1)
Level 3	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the seller disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards pursuant to 40 CFR § 745.113(a)(2)
Level 2	Lessor and Agent Requirement: Failure to include, as an attachment or within the contract to lease target housing, the Lead Warning Statement pursuant to 40 CFR § 745.113(b)(1)
Level 3	Lessor and Agent Requirement: Failure to include, as an attachment or within the contract to lease target housing, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards pursuant to 40 CFR § 745.113(b)(2)
Opportunity to Conduct Inspection	
Level 3	Seller and Agent Requirement: Failure to permit the purchaser a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards or to obtain the purchaser's waiver of such opportunity in writing pursuant to 40 CFR § 745.110

Circumstance Level	Disclosure Rule Violation
	Certification and Acknowledgment
Level 5	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a list of any records or reports available to the seller that pertain to the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such records are available pursuant to 40 CFR § 745.113(a)(3)
Level 4	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the purchaser affirming receipt of the information required by 40 CFR §§ 745.113(a)(2) and (a)(3) and the lead hazard pamphlet required under 15 USC § 2696 (sic, misprint should read § 2686) as specified in 40 CFR § 745.113(a)(4)
Level 4	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the purchaser that he/she has either had an opportunity to conduct risk assessment or inspection or has waived the opportunity to do so pursuant to 40 CFR § 745.113(a)(5)
Level 5	Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by 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/her duty to ensure compliance with the Disclosure Rule pursuant to 40 CFR § 745.113(a)(6)
Level 5	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a list of any records or reports available to the lessor that pertain to the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such records are available pursuant to 40 CFR § 745.113(b)(3)
Level 4	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a statement by the lessee affirming receipt of the information required by 40 CFR §§ 745.113(b)(2) and (b)(3) and the lead hazard pamphlet required under 15 USC § 2696 (sic, misprint should read § 2686) as specified in 40 CFR § 745.113(b)(4)
Level 5	Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a statement by 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/her duty to ensure compliance with the Disclosure Rule pursuant to 40 CFR § 745.113(b)(5)

Circumstance Level	Disclosure Rule Violation
	Failure to Retain Records/Signatures and Dates
Level 6	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, the signatures of the sellers, agents and purchasers certifying to the accuracy of their statements, as well as dates of said signatures, pursuant to 40 CFR § 745.113(a)(7)
Level 6	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, the signatures of the lessors, agents and lessees certifying to the accuracy of their statements, as well as dates of said signatures, pursuant to 40 CFR § 745.113(b)(6)
Level 6	Seller, Lessor, and Agent Requirement: Failure to retain a copy of the completed disclosure records for no less than three years from the commencement date of the lease or the completion date of the sale pursuant to 40 CFR § 745.113(c)(1)

Extent Category Matrix

Occupant of the target housing is:	A child under 6 years of age, or a pregnant woman	A child 6 years of age or older but less than 18 years of age or age of occupant not provided	18 years of age or older
Extent:	Major	Significant	Minor

Gravity-Based Penalty Matrix[13]

for violations occurring on or after March 15, 2004

The gravity based penalty, a function of the nature, circumstances, and extent of each violation, is guided by the following matrix.

Circumstance	Major Extent	Significant Extent	Minor Extent
HIGH			
Level 1	$11,000	$7,740	$2,580
Level 2	$10,320	$6,450	$1,550
MEDIUM			
Level 3	$7,740	$5,160	$770
Level 4	$5,160	$3,220	$520
LOW			
Level 5	$2,580	$1,680	$260
Level 6	$1,290	$640	$130

Gravity-Based Penalty Matrix[14]

for violations occurring on or before March 14, 2004

The gravity based penalty, a function of the nature, circumstances, and extent of each violation, is guided by the following matrix.

Circumstance	Major Extent	Significant Extent	Minor 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

[13] This matrix takes into consideration the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 CFR Part 19 (2004).

[14] This matrix takes into consideration the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 CFR Part 19 (1998).

Appendix C Internet References for Policy Documents

EPA maintains a website with copies of applicable policies and other useful information

EPA Home Page:

http://www.epa.gov

Compliance and Enforcement Home Page:

http://www.epa.gov/compliance/

EPA's 1984 Civil Penalty Policy:

http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf

Documenting Penalty Calculations and Justifications of EPA Enforcement Actions, (Aug 1990):

http://www.epa.gov/compliance/resources/policies/civil/rcra/caljus-strock-mem.pdf

TSCA Enforcement Policy and Guidance Documents:

http://cfpub.epa.gov/compliance/resources/policies/civil/tsca/

Supplemental Environmental Projects:

http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

Final Supplemental Environmental Projects Policy (1998)

http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsup-hermn-mem.pdf

SEPs in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases (Nov 2004)

http://www.epa.gov/compliance/resources/policies/civil/seps/sepssection1018-leadbasedpaint112304.pdf

Treatment of Lead-based Paint Abatement Work as a Supplemental Environmental Project in Administrative Settlements (Jan 2004)

http://www.epa.gov/compliance/resources/policies/civil/seps/leadbasedabatement-sep012204.pdf

Audit Policy:

http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html

Appendix C Internet References for Policy Documents

Small Business Policy:

http://www.epa.gov/compliance/incentives/smallbusiness/index.html

Redelegation of Authority:

http://www.epa.gov/compliance/resources/policies/civil/rcra/hqregenfcases-mem.pdf

HUD Technical Guidelines for the Evaluation and Control of Lead Based Paint Hazards in Housing:

http://www.hud.gov/offices/lead/guidelines/hudguidelines/index.cfm

Appendix D Examples of Potential Supplemental Environmental Projects

The following list of potential Supplemental Environmental Projects (SEPs) is not exhaustive, but is intended to offer some examples.[15]

- Abatement of lead-based paint and/or lead-based paint hazards in target housing in compliance with requirements of 40 CFR 227(e)
- Renovation (such as window or door replacement) that includes removal of components containing lead-based paint and/or lead-based paint hazards from target housing, followed by clearance testing as defined in 40 CFR 227(e)(8)
- Risk assessment of target housing to identify lead-based paint hazards, followed by correction of any hazards identified
- Acquisition of an XRF for a governmental organization
- Address lead-based paint and/or lead-based paint hazards in a child-occupied facility through abatement, renovation with clearance testing, or risk assessment with correction of lead-based paint hazards
- Blood-lead level screening and/or treatment for children where Medicaid coverage is not available (Blood-lead level screening and/or treatment for children underserved by Medicaid may also be appropriate, with approval from the Special Litigation and Projects Division in OECA)
- Purchase and operate a mobile health clinic, including outfitting the mobile units … for example, blood lead level testing and treatment for children in public housing
- Purchase and donate lead health screening equipment to schools, public health departments, clinics, etc.
- Provide free lab tests for lead in dust, soil and paint chip samples; make testing available to low-income homeowners, small rental property owners, and community-based organizations

[15] Whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. *(See, Supplemental Environmental Projects Policy, May 1, 1998, page 3)*