

# New EPA Guidance: Property Management Companies Now Subject to the Lead Renovation, Repair and Painting Rule

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EPA recently announced the Agency will more broadly interpret the applicability of the Toxic Substances Control Act's (TSCA) Lead Renovation, Repair, and Painting (RRP) rule. The RRP rule establishes training, certification, information distribution, and work practice requirements for firms who "perform, offer, or claim to perform" renovations, repair, and painting projects that disturb lead-based paint in homes, child care facilities and pre-schools built before 1978.<sup>[1]</sup> EPA intends to hold property management companies (PMCs) liable for retained contractors who renovate or repair the pre-1978 properties PMCs manage. RRP rule liability can be significant. PMCs should review their compliance programs and consider updates.

## EPA's New Guidance

To aid in the implementation of the RRP rule, EPA published non-binding guidance via Frequently Asked Questions (FAQs) on March 22, 2018.<sup>[2]</sup> On November 4, 2021, EPA published a Notice in the Federal Register. This announced EPA's intent to withdraw two FAQs concerning PMCs' compliance responsibilities under the RRP rule.<sup>[3]</sup>

## FAQs to be Withdrawn:<sup>[4]</sup>

- **Question (23002-13650).** A property management company performs most of the clerical functions of the business, and hires plumbers, electricians, carpenters, etc., for its renovation needs. Does the property management company need firm certification?
- A property management company acts as an agent for the landlord and has the same responsibilities as the landlord under the RRP rule. Therefore, if the property management company uses its own employees to do the work, the property management company must be a certified firm and one of the employees must be a certified renovator. If the property management company hires a renovation firm to perform the renovation, the property management company does not need firm or renovator certification, but the firm the property management company hires must be certified and must perform the renovation using a certified renovator that directs and provides on-the-job training to any workers that are not certified renovators.

- **Question (23002-18348).** If a property management company hires a certified firm to perform a renovation and the firm violates the RRP rule, for example, by failing to distribute the necessary materials or keep proper records, which entity is subject to enforcement action, the property manager or the certified firm?
- It is the certified firm's responsibility to comply with the requirements of the RRP rule, and any enforcement action taken would be against the firm.

EPA received public comment from six commenters on the Notice. EPA concluded that the comments did not identify information that changed the Agency's determination to withdraw the FAQs.<sup>[5]</sup> EPA Administrator Michael Regan approved the recommendation to withdraw the FAQs in a memorandum dated January 11, 2022.<sup>[6]</sup> The withdrawal is effective on March 21, 2022.

## EPA's Rationale for Withdrawing the FAQs

In the November 4, 2021 Federal Register Notice, EPA stated its rationale for withdrawing the FAQs. EPA based the decision upon its practical experience implementing the RRP rule since the rule was initially published in 2010.<sup>[7]</sup> EPA reasoned that at the time the FAQs were written, EPA "did not think that a PMC that hired a renovation firm to perform a renovation would itself be doing work such that it also would be performing or offering to perform the renovation for compensation. Therefore, EPA did not think the PMC would need to comply with the RRP rule and need to be a certified firm."<sup>[8]</sup>

Since the FAQs were published, EPA has expanded its understanding of PMCs' varying levels of involvement in renovation projects. EPA offered, "In some cases, the PMC might offer to perform renovation, repair, or painting activities through its contractual agreements with the building owner, and in other cases the PMC might perform an element of the renovation for compensation."

EPA has broadened its interpretation of "offering to perform" and "claiming to perform"<sup>[9]</sup> to encompass actions such as:

- Soliciting and evaluating contractor bids;
- Applying for permits, as appropriate;
- Granting contractors access to the property;
- Overseeing contractor work on the property;
- Informing tenants of renovation activity;
- Verifying completion of renovation activity; or
- Remitting payment to the contractors.

## Effect of Withdrawing the FAQs

The practical effect of withdrawal of the FAQs is that pursuant to EPA guidance, PMCs are now required to obtain a Renovation Firm Certification.<sup>[10]</sup> With this certification attaches additional responsibilities. Those include ensuring renovations are performed by certified renovators and appropriately trained employees, maintaining certain records required by the RRP rule, renewing a renovator's training and certification, and more.<sup>[11]</sup>

Importantly, EPA also stated its intent to "hold both the PMCs and the contractors they hire responsible for compliance if the circumstances indicate that both entities performed or offered to perform renovations" under the RRP rule.<sup>[12]</sup> Under TSCA, EPA maintains broad authority to assess civil and criminal penalties for violations of the RRP rule.<sup>[13]</sup> For example, penalties for a failure to maintain required documents reach \$40,576 per violation, per day.<sup>[14]</sup> "Knowing violations" can result in criminal penalties of up to \$50,000 per violation per day, or imprisonment for not more than one year, or both, in addition to or in lieu of civil penalties.<sup>[15]</sup>

EPA's broad reading of the RRP rule and expressed interest in making larger, more-capitalized businesses like PMCs responsible for the compliance of smaller contractors reflects EPA's attempt to expand the applicability of the RRP rule via guidance rather than legally enforceable regulatory amendments of the RRP rule.

## Key Takeaways

- New EPA guidance says that “EPA plans to hold both the PMCs and the contractors they hire responsible for compliance if the circumstances indicate that both entities performed or offered to perform renovations for compensation in target housing or child-occupied facilities.”<sup>[16]</sup>
- Property management companies should review their compliance programs, including for consistency with the standards EPA and DOJ set in prior RRP rule enforcement actions.

For further information or questions about TSCA's Lead Renovation, Repair, and Painting Rule and potential impacts on your business, please contact Jonathan D. Brightbill (Partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Eleni Kouimelis (Partner, Environmental), or your Winston relationship attorney.

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*Please note that guidance on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date above.*

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<sup>[1]</sup> See generally 40 C.F.R. §§ 745.80 – 745.92; see also <https://www.epa.gov/lead/lead-renovation-repair-and-painting-program-rules>

<sup>[2]</sup> EPA Lead-Based Paint Program Frequent Questions (Mar. 22, 2018) [https://www.epa.gov/sites/default/files/2018-03/documents/full\\_rrp\\_fqs\\_march\\_22\\_2018.pdf](https://www.epa.gov/sites/default/files/2018-03/documents/full_rrp_fqs_march_22_2018.pdf)

<sup>[3]</sup> EPA Press Release, *EPA to Hold Building Managers Responsible for Lead-Based Paint Safety Requirements*, (Nov. 4, 2021) <https://www.epa.gov/newsreleases/epa-hold-building-managers-responsible-lead-based-paint-safety-requirements>. See also 86 FR 60812, <https://www.federalregister.gov/documents/2021/11/04/2021-24010/withdrawal-of-two-answers-to-frequent-questions-about-property-management-companies-and-the-toxic>

<sup>[4]</sup> *Supra* note 2.

<sup>[5]</sup> EPA Memorandum, *Consideration of Public Comments on Withdrawal of Two Answers to Frequent*

*Questions about Property Management Companies and the Toxic Substances Control Act*

*Lead-based Paint Renovation, Repair and Painting Rule*, (Jan. 5, 2022) <https://www.epa.gov/system/files/documents/2022-01/oeca-22-000-1701.pdf>

<sup>[6]</sup> *Id.*

<sup>[7]</sup> 86 FR 60812, <https://www.federalregister.gov/documents/2021/11/04/2021-24010/withdrawal-of-two-answers-to-frequent-questions-about-property-management-companies-and-the-toxic>.

<sup>[8]</sup> *Id.*

<sup>[9]</sup> *Id.* (“When a PMC hires a firm for renovation, repair or painting activities, the PMC, as part of the business relationship with the property owner, is typically compensated for managing certain activities that are necessary or even integral to the performance of the renovation, repair or painting activity[.]”

<sup>[10]</sup> EPA Press Release, *EPA Affirms Building Managers Responsible for Lead-Based Paint Safety Requirements When Performing Renovations*, (Jan. 21, 2022) <https://www.epa.gov/newsreleases/epa-affirms-building-managers-responsible-lead-based-paint-safety-requirements-when>.

<sup>[11]</sup> *Id.*

<sup>[12]</sup> *Id.*

<sup>[13]</sup> 15 U.S.C. § 2615.

<sup>[14]</sup> 15 U.S.C. § 2615(a)(1).

<sup>[15]</sup> *Id.* § 2615(b)(1).

<sup>[16]</sup> *Supra* note 10.

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