

Information Regarding the Implementation of Local Law 66 of 2019: Amendment to the Definition of Lead-based Paint under Article 14 of the Housing Maintenance Code

All information provided below is based on the proposed amendments to Chapter 11 of Title 28 of the Rules of the City of New York by the Department of Housing Preservation and Development (HPD). The proposed rule may be revised prior to final adoption and implementation. This document will be updated appropriately based on the final adopted rule.

This document is for informational purposes only and does not constitute legal advice. This document is not a complete statement of building owners' responsibilities relating to lead-based paint or any other topic. As we receive questions, we will continue to update the Question and Answer sections to share updates. For information on lead-based paint compliance in New York City and an owner's obligation to address lead-based paint issues, please go to HPD's website at www.nyc.gov/lead-based-paint.

Local Law number 66 for the year 2019 (Local Law 66) provides for amendment to the definition of lead-based paint once HPD promulgates a rule stating that the federal Department of Housing and Urban Development (HUD) has provided at least one performance characteristic sheet (PCS) approving a commercially available x-ray fluorescence analyzer machine tested at the action level of 0.5 milligrams of lead per square centimeter (0.5 mg/cm²).

HUD has approved a PCS which provides for use of an x-ray fluorescence analyzer (Viken Detection Model Pb200i) to test for lead paint at the level of 0.5 milligrams of lead per square centimeter. Therefore, HPD is amending its lead paint rules in Chapter 11 of Title 28 of the Rules of the City of New York to include a statement about HUD's approval and to incorporate the definition of lead-based paint at the level of 0.5 mg/cm², as provided under Local Law 66. The new definition will apply to all activities under Article 14 of the Housing Maintenance Code (Local Law #1) as of the effective date of the rule.

APPROVED PERFORMANCE CHARACTERISTIC SHEET FOR XRF TESTING DEVICE

In December 2020, the Department of Housing and Urban Development (HUD) approved a Performance Characteristic Sheet (PCS) for the Viken Detection Model Pb200i to perform testing of lead in paint at a 0.5mg/cm² action level. This machine is more accurate at testing lower levels of lead in paint than the currently available XRF machines at their programmed state. According to the December 2020 PCS for the Viken Pb200i which tests at 0.5 mg/cm², XRF results are classified as **positive** if they are greater than or equal to 0.6 mg/cm², **negative** if they are less than or equal to 0.4 mg/cm² and **inconclusive** if they are equal to 0.5 mg/cm².

Unless paint chip testing is performed to demonstrate the paint is negative for lead, the inconclusive reading of 0.5 mg/cm² is defined as lead-based paint under Local Law 1.

TIMELINE FOR IMPLEMENTATION

Given that HUD has approved an instrument to test at the 0.5 mg/cm² threshold, HPD is proposing to amend the definition of lead-based paint from 1.0 mg/cm² to 0.5 mg/cm² in a Rule, effective on December 1, 2021.

If the final Rule includes the proposed dates, beginning December 1, 2021, all lead-based paint testing must be performed using an XRF instrument with an approved PCS (currently the Viken Detection Model Pb200i) at an action level of 0.5 mg/cm² issued by HUD. This change affects multiple processes related to lead-based paint that affect owners and tenants, including:

- HPD **violation** issuance
- XRF testing required of all apartments subject to LL1 by August 2025
- XRF testing related to **turnover** compliance verification showing that window and door friction surfaces do not need to be abated
- XRF Testing performed related to applications for **exemption** from Sections of Local Law 1

1. Can landlords begin testing using XRF machines that measure the 0.5 mg/cm² action level earlier than December 1, 2021?

Yes. Since this standard is stricter than the current standard, instruments that have an approved PCS issued by HUD and have been reprogrammed to test at the 0.5 mg/cm² threshold will be accepted for use prior to December 1, 2021 for testing processes such as contestation of HPD violations where lead-based paint is presumed to exist (violation orders #616 and #621), Local Law 31 compliance, and Exemptions (see caveat below in the Exemptions section). Currently, the only XRF machine approved to test at 0.5 mg/cm² – once reprogrammed appropriately by the manufacturer – is the Viken Detection Model Pb200i.

2. If testing is being done now using a device that measures at a standard of 1.0 mg/cm² but the result of the test is 0.4 mg/cm² or below, can I use that result to meet the new standard after December 1, 2021?

No. An XRF instrument testing at an action level of 1.0 mg/cm² is not as accurate at testing lower levels of lead in paint as an XRF instrument programed at an action level of 0.5 mg/cm² and the results are not comparable. The Viken Detection Model Pb200i instrument must be reprogrammed to test accurately at an action level of 0.5 mg/cm².

HPD VIOLATIONS

HPD currently conducts lead-based paint inspections whenever there is an inspection of a unit where a child under age six routinely spends 10 or more hours a week and the building was built prior to 1960. In most cases where peeling paint is observed, the HPD inspection includes

XRF testing of surfaces. Beginning December 1, 2021, HPD will conduct inspections using the HUD-approved Viken Detection Model Pb200i reprogrammed to test at the 0.5 mg/cm² threshold. Violations will be issued using the new lower definition of lead-based paint based on the readings from this device.

1. What violation will be issued by HPD if the XRF reading is 0.5 mg/cm²?

According to the HUD-approved PCS for the Viken model XRF instrument, a result of 0.5 mg/cm² is inconclusive when tested using the re-programmed instrument. HPD will issue a violation for a lead-based paint hazard testing at 0.5 mg/cm² but allow the owner to contest the violation by providing paint chip analysis results that would determine the paint to be negative.

2. Will an XRF reading of 0.4 mg/cm² result in a lead-based paint violation from HPD?

No. XRF machine readings are provided to the tenth place (i.e. 0.1, 0.4, 0.6). A result at or below 0.4 mg/cm² is below the threshold for the issuance of a violation.

3. Will an XRF reading of 0.6 mg/cm² result in a lead-based paint violation??

Yes. XRF machine readings are provided to the tenth place (i.e. 0.1, 0.4, 0.6). A result at or above 0.6 mg/cm² will be positive according to the PCS. As such, owners will not be able to contest a violation issued at or above 0.6 mg/cm² with a paint chip analysis.

4. Will property owners be required to contest a violation order #616 (presumed lead-based paint hazard violations) issued prior to December 1, 2021 with an XRF reading that is below 0.5 mg/cm²?

For violations **issued as an order #616 prior to December 1, 2021**, property owners will be able to contest the violation using 1.0 mg/cm² as the definition of lead-based paint. Property owners may use either an XRF testing performed by an instrument set to measure lead-based paint at 1.0 mg/cm² or an instrument set to measure at 0.5 mg/cm² as long as the numeric result of the test is less than 1.0 mg/cm², the definition of lead-based paint at the time it was issued.

TURNOVER

All property owners of pre-1960 rental housing are required by law to conduct and document an inspection at turnover (vacancy, prior to re-occupancy), and have been required to abate painted window and door friction surfaces upon the first turnover since August 2004 and remediate lead-based paint hazards on any other painted surface in the apartment at every turnover, along other obligations. If you need more information on this legal obligation, see our webpage: www.nyc.gov/lead-based-paint.

1. If the property owner has not been conducting turnover inspections because previous testing indicated no lead-based paint, will the owner have to test again at the new action level?

If a property owner tested the painted window and door friction surfaces at the 1.0 mg/cm² threshold and they tested negative for lead-based paint at the threshold in effect on the date that the testing was done, and remediated any lead-based paint hazards as defined in Section 27-2056.8, you met the requirements for turnover during that turnover period. Testing performed as a part of the turnover process is independent of the exemption process. Only a Lead Free Exemption granted by HPD removes the responsibility to do the turnover inspections.

Starting December 1, 2021, any turnover of a unit would require new testing of the painted window and door friction surfaces to determine if there is lead-based paint under the new action level of 0.5 mg/cm². If the surfaces are at or above 0.6 mg/cm², the window and door friction surfaces must be abated through permanent removal of the paint or replacing the window or door with a new component. Results of 0.5 mg/cm² must be accompanied by a paint chip sample showing the surface to be negative or the owner must abate the surface. The property owner must address all turnover requirements using the new 0.5 mg/cm² action level as the definition of lead-based paint. If the test results are positive, the owner must perform the required remediation of the painted surfaces as lead-based paint hazards. The other alternative is that the owner may proceed without testing the painted surfaces again and presume all painted surfaces that would require remediation at turnover are lead-based paint under the new definition.

Also starting December 1, 2021, an owner with any unit granted an exemption (either granted individually for the unit or granted for the units of the building under one exemption) under the 1.0 mg/cm² action level must inform HPD when the first turnover (vacancy, prior to re-occupancy) occurs after that date, at which time, the exemption will be revoked. The unit is then subject to all of the requirements under Local Law 1. HPD will be providing additional information to property owners who have existing exemptions about how and when to notify HPD after this Rule becomes final.

XRF TESTING REQUIREMENT – ALL UNITS (LOCAL LAW 31 COMPLIANCE)

Conducting XRF testing in all units is required and must be documented by all property owners of pre-1960 rental housing, and in all housing built 1960-1978 where the owner has knowledge of lead-based paint, by August 2025. If you need more information about this legal obligation, see our webpage: www.nyc.gov/lead-based-paint

1. If the apartment was tested for compliance with Local Law 31 using an XRF machine which tested at the 1.0 mg/cm² action level, will another full apartment test be required at the 0.5 mg/cm² action level on December 1, 2021?

The apartment is not required to be tested again for compliance with Local Law 31, but you may wish to do so. After December 1, 2021, the results of the testing performed at the 1.0 mg/cm² level: 1) cannot be used to determine that components are negative for lead-based paint under Local Law 1; 2) do not satisfy the turnover requirements; and 3) do not relieve the owner of completing work using safe work practices.

Apartments tested starting on December 1, 2021 must be tested by an instrument with the HUD-approved PCS at the 0.5 mg/cm² action level. According to the HUD-approved PCS of the Viken instrument, surfaces with a result of 0.6 mg/cm² have lead-based paint, surfaces with a result of 0.5 mg/cm² do not conclusively have lead-based paint but require a paint chip sample to confirm (or can be presumed to have lead-based paint) , and surfaces with a result of 0.4 or below are negative for lead-based paint. Positive surfaces (or inconclusive surfaces that have not been proven negative from a paint chip analysis) only need to be 1) remediated if they are peeling/disturbed or, 2) if they are doors or windows, have the friction surfaces abated at the next turnover (vacancy, prior to re-occupancy).

2. Can Local Law 31 compliance inspections be used to apply for an exemption?

HPD encourages owners to apply for a Lead Free or Lead Safe Exemption based on the results of a Local Law 31 compliance inspection. As of December 1, 2021, if all results are negative when tested using a HUD-approved instrument at the 0.5 mg/cm² action level, the owner may apply for a Lead Free Exemption without further work. If there are positive results (or inconclusive results not proven negative with a paint chip analysis), the owner may apply for a Lead Free Exemption if abatement work is done on the positive or inconclusive surfaces to permanently remove the paint or replace the component. If containment or encapsulation is used as a part of the abatement, an owner may apply for a Lead Safe Exemption. As a reminder, the owner must complete an Exemption Application and must submit all required documents (this includes additional documents beyond the XRF test results) before HPD will verify the documentation is appropriate and complete in order to receive an Exemption.

Note: Local Law 31 testing prior to December 1, 2021 can also be used to apply for an exemption; however, exemptions granted based on testing at the 1.0 mg/cm² are subject to revocation upon turnover – see below section on Exemptions for more information.

EXEMPTIONS

Property owners may file with HPD for an exemption from some of the provisions of Local Law 1. The change to the definition of lead-based paint will affect exemptions filed based on XRF testing conducted at the 1.0 mg/cm² threshold. The Exemption Application can be found on the HPD website at: www.nyc.gov/lead-based-paint

1. What will happen to my current exemption based on the change in the lead-based paint testing level?

Any exemptions granted at the 1.0 mg/cm² action level will be revoked on the first turnover occurring on or after December 1, 2021.

2. How will the Exemption revocation process work?

Owners are obligated to notify HPD when the turnover occurs on exempt apartments (either granted individually for the unit or granted for the units of the building under one exemption). Once the final rule is published, HPD will notify owners via mail and email about the exact process to notify HPD about the turnover. When HPD receives turnover

notice from a property owner, HPD will revoke the exemption and the unit will be subject to Local Law 1, including the requirements for that turnover. HPD will send a confirmation of revocation to the owner along with information on how to apply for a new exemption.

The owner may submit a new exemption application with testing completed at the 0.5 mg/cm² action level using an instrument with the HUD-approved PCS at that action level and abatement/remediation work completed as required to obtain the exemption.

- 3. Will any apartment that is vacant on December 1, 2021 have its exemption revoked, or will only an apartment that turns over (becomes vacant) after that date have its exemption revoked? If an apartment is leased but not occupied on that date, will the exemption remain?**

Any apartment with a **new lease occupancy date after December 1, 2021** (therefore vacant on December 1, 2021) will have its exemption revoked and is subject to compliance with turnover requirements and all other Local Law 1 requirements. Any lead-based paint testing that is performed to ensure compliance with the turnover requirements or to submit for a new exemption must use the new 0.5 mg/cm² action level for lead-based paint and an instrument with the HUD-approved PCS at that action level.

- 4. When will HPD begin accepting exemption requests for testing completed at the 0.5 mg/cm² action level?**

HPD will begin accepting exemption requests that includes testing at the 0.5 mg/cm² action level as performed using an instrument with the HUD-approved PCS at that action level on November 1, 2021. However, property owners may begin testing at the new action level before this date with an approved instrument reprogrammed to report at the new action level of 0.5 mg/cm².

- 5. Will exemptions at the 1.0 mg/cm² action level continue to be accepted by HPD after December 1, 2021?**

HPD will continue to accept applications at the 1.0 mg/cm² action level until March 1, 2022 **ONLY IF** the testing was conducted at the 1.0 mg/cm² action level prior to December 1, 2021 **AND** unit will not turnover before March 1, 2022. As a reminder, any exemptions granted prior to December 1, 2021 at the 1.0 mg/cm² action level are only valid until the unit vacated at the first turnover after December 1, 2021. The unit may have been granted an individual exemption or it may have been granted for the units of the building as whole under one exemption. See questions 1 and 2 in this section for more information about revocation of exemptions at the 1.0 mg/cm² action level.