

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

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. For information on lead-based paint compliance under NYC's Childhood Lead Poisoning Prevention Act of 2003, also known as Local Law 1 of 2004 (Local Law 1) and an owner's obligation to address lead-based paint issues, please go to HPD's website at www.nyc.gov/lead-based-paint.

The Department of Housing Preservation and Development (HPD) has adopted amendments to Chapter 11 of Title 28 of the Rules of the City of New York, including an amended definition of lead-based paint. The amended definition takes effect on December 1, 2021. The amendments to Chapter 11 of Title 28 of the Rules of the City of New York implement Local Law number 66 for the year 2019 (Local Law 66), which provides for an amended definition of lead-based paint when 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 (XRF) tested at the level of 0.5 milligrams of lead per square centimeter. HUD has approved a PCS which provides for use of an XRF (currently Viken Detection Model Pb200i) to test for lead paint using the action level of 0.5 milligrams of lead per square centimeter. Therefore, HPD has amended its lead paint rules to include a statement about HUD's approval and to incorporate the amended definition of lead-based paint, as required by Local Law 66. Local Law 66 defines lead-based paint as "0.5 milligrams of lead per square centimeter or greater, as determined by laboratory analysis, or by an x-ray fluorescence analyzer."

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 tested at a 0.5mg/cm² action level. According to the December 2020 PCS for the Viken Pb200i tested 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
- **inconclusive** if they are equal to 0.5 mg/cm². HPD will presume a surface with an XRF result of 0.5 mg/cm² is lead-based paint based on the definition unless the analysis of a paint chip sample shows the results to be negative for lead-based paint.

TIMELINE FOR IMPLEMENTATION

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
- HPD violation contestation
- 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 for applications for **exemption** from the presumption of lead-based paint under 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, test results from instruments that have an approved PCS issued by HUD at the 0.5 mg/cm² action level and have been reprogrammed to test at the 0.5 mg/cm² action level will be accepted. These XRF test results may be used 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 the 0.5 mg/cm² action level – 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 has not been proven to accurately test lower levels of lead in paint as has an XRF instrument with a HUD-approved PCS that has been programmed at an action level of 0.5 mg/cm². The Viken Detection Model Pb200i instrument has been issued an approved PCS to test at the action level of 0.5 mg/cm² but must be reprogrammed by the manufacturer to test accurately at that action level.

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 the compromised painted 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 action level. Violations will be issued using the new 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 classified as inconclusive when tested using the reprogrammed 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. An owner cannot provide XRF testing to contest the violation issued at 0.5 mg/cm².

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

No. A result at or below 0.4 mg/cm² is below the definition threshold for the issuance of a lead-based paint violation.

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

Yes. A result at or above 0.6 mg/cm² will be positive. As such, owners will not be able to contest a violation issued at or above 0.6 mg/cm² with a paint chip analysis or additional XRF testing.

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 must use XRF testing performed by an instrument set to the action level of 1.0 mg/cm² to contest these pre-December 1, 2021 violations.

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 requirement, 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?

Starting December 1, 2021, any unit that has been granted an exemption under the action level of 1.0 mg/cm² loses that exemption status at the first turnover of that unit and must perform the turnover requirements as well as report that turnover to HPD for revocation of the exemption. The owner would be required to submit a new exemption application for the unit and be granted a new “Lead Free” Exemption status based on testing conducted with an XRF machine that is set to the action level of 0.5 mg/cm² (see below section on Exemptions for more information) in order to not have to perform the required turnover activities.

Sample forms for documenting turnover and a full explanation of turnover requirements can be found on our webpage: www.nyc.gov/lead-based-paint.

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 requirement, 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 31; 2) cannot be used to satisfy the turnover requirements; and 3) do not relieve the owner of completing work using safe work practices.

Apartments tested for Local Law 31 compliance starting on December 1, 2021 must be tested by an instrument with the HUD-approved PCS at the 0.5 mg/cm² action level.

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. HPD will start accepting testing performed at the 0.5 mg/cm² action level using a HUD-approved instrument on November 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 conducted prior to December 1, 2021 based on testing at the 1.0 mg/cm² action level can also be used to apply for an exemption for a limited period of time; however, exemptions granted based on testing at the 1.0 mg/cm² action level are no longer in effect 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 action level. 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 no longer be in effect 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 turnover occurs on exempt apartments (either granted individually for the unit or granted for the units of the building under one exemption). HPD will be notifying owners in October/November 2021 with a list of their existing HPD-issued exemptions and will provide them with information about the process on how to notify HPD about the turnover when it occurs. HPD will also post the required form owners must use for this notification process on the HPD webpage. When HPD receives notice of turnover from a property owner, or if HPD becomes aware of the turnover, HPD will revoke the exemption. However as of the date of the turnover, notwithstanding the issuance of a notice from HPD of the revocation, the unit will again be subject to Local Law 1, including the requirements for that turnover. HPD will send a notice 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 any abatement work completed as required to obtain the exemption.

3. Will any apartment that is vacant on December 1, 2021 have its exemption no longer in effect, or will only an apartment that turns over (becomes vacant) after that date have its exemption no longer in effect? 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 no longer in effect as of December 1, 2021 or the date of vacancy, whichever date is later, and the owner must notify HPD of this turnover. The unit is once again subject to compliance with the turnover requirements (for

that turnover) and all other Local Law 1 requirements from which it was previously exempt. 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 be tested by an XRF 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 applications that includes testing at the 0.5 mg/cm² action level 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 test 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 the** 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 is vacated at the first turnover after December 1, 2021. Any exemptions granted at the 1.0 mg/cm² action level between December 1, 2021 and March 1, 2022 will also only remain in effect until the first turnover. The unit may have been granted an individual exemption or the exemption may have been granted for the units of the building as a whole under one exemption. See questions 1 and 2 in this section for more information about the process for notifying HPD of the turnover of exempted unit at the 1.0 mg/cm² action level.