

**CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT**

**Notice of Adoption of Amendments to Rules Regarding
Lead Poisoning Prevention and Control**

Notice is hereby given that pursuant to the authority vested in the Commissioner of the Department of Housing Preservation and Development ("HPD") by sections 1043 and 1802 of the New York City Charter, Local Law number 66 for the year 2019, and section 27-2090 of the Administrative Code of the City of New York, HPD is adopting amendments to Chapter 11 of Title 28 of the Rules of the City of New York, concerning lead poisoning prevention and control, to amend the definition of lead-based paint and other conforming amendments.

Statement of Basis and Purpose

These 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 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 (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 is amending 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."

The amendments to the rules clarify that, upon an XRF reading at the level of 0.5 milligrams of lead per square centimeter, HPD inspectors will presume lead-based paint on a surface during an inspection of lead paint hazards using an XRF, based upon the new lead paint definition. The PCS for the Viken Detection Model Pb200i classifies 0.5 milligrams of lead per square centimeter as inconclusive for lead paint, therefore, in accordance with existing law (Local Law number 1 for the year 2004), HPD will issue a presumed lead violation for surfaces that test at this level, based upon the presence of peeling lead paint and the residency of a child under the age of six in a multiple dwelling constructed before 1960, and permit owners to contest the presumption by submitting a laboratory analysis of a paint chip sample from the surface where the violation was placed. If the paint chip sample test is negative, the violation will be closed. If the paint chip sample test is positive or no paint chip sampling is completed, owners will be required to remediate the positive lead paint hazard violation pursuant to the law.

For exemption applications, HPD will presume lead-based paint exists for XRF readings submitted at 0.5 milligrams of lead per square centimeter if the testing is classified as inconclusive according to the PCS, unless the application contains a laboratory analysis of a paint chip sample of the surface from which the 0.5 XRF reading was taken that is negative for lead-based paint. In addition, under these amendments, owners will be permitted to submit exemption applications using the current lead paint definition of 1.0 mg/cm² until March 1, 2022, as long as the testing for such exemption application was performed prior to December 1, 2021, which is the effective date of the new lead paint definition. The new definition applies to all activities under Article 14 of the Housing Maintenance Code.

Additional information about the rule is available under the Local Law and Rules tab on the HPD website: www.nyc.gov/lead-based-paint.

New material is underlined.

[Deleted material is bracketed]

Section 1. Subdivision (t) of section 11-01 of chapter 11 of title 28 of the rules of the city of New York is amended to read as follows:

(t) **Lead-based paint.** (1) "Lead-based paint" shall mean paint or other similar surface coating material containing 1.0 milligrams of lead per square centimeter or greater, as determined by laboratory analysis, or by an x-ray fluorescence analyzer. If an x-ray fluorescence analyzer is used, readings shall be corrected for substrate bias when necessary as specified by the performance characteristic sheets released by the United States environmental protection agency and the United States department of housing and urban development for the specific x-ray fluorescence analyzer used. X-ray fluorescence readings shall be classified as positive, negative or inconclusive in accordance with the United States department of housing and urban development "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing" (July 2012) and the performance characteristic sheets released by the United States environmental protection agency and the United States department of housing and urban development for the specific x-ray fluorescence analyzer used. X-ray fluorescence readings that fall within the inconclusive zone, as determined by the performance characteristic sheets, shall be confirmed by laboratory analysis of paint chips, results shall be reported in milligrams of lead per square centimeter and the measure of such laboratory analysis shall be definitive. If laboratory analysis is used to determine lead content, results shall be reported in milligrams of lead per square centimeter. Where the surface area of a paint chip sample cannot be accurately measured or if an accurately measured paint chip sample cannot be removed, a laboratory analysis may be reported in percent by weight. In such case, lead-based paint shall mean any paint or other similar surface-coating material containing more than 0.5 percent of metallic lead, based on the non-volatile content of the paint or other similar surface-coating material.

(2) The federal department of housing and urban development has provided a performance characteristic sheet approving a commercially available x-ray fluorescence analyzer tested at the level of 0.5 milligrams of lead per square centimeter. Notwithstanding paragraph (1) of this subdivision, on and after December 1, 2021, "lead-based paint" shall mean paint or other similar surface coating material containing 0.5 milligrams of lead per square centimeter or greater, as determined by laboratory analysis, or by an x-ray fluorescence analyzer. X-ray fluorescence readings shall be classified as positive or negative in accordance with such performance characteristic sheet or other guidance. If laboratory analysis is used to determine lead content, results shall be reported in milligrams of lead per square centimeter. Where the surface area of a paint chip sample cannot be accurately measured or if an accurately measured paint chip sample cannot be removed, a laboratory analysis may be reported in percent by weight. In such case, lead-based paint shall mean any paint or other similar surface-coating material containing more than 0.25 percent of metallic lead, based on the non-volatile content of the paint or other similar surface-coating material.

§ 2. Section 11-07 of chapter 11 of title 28 of the rules of the city of New York is amended to read as follows:

§11-07 Presumption.

(a) In any multiple dwelling erected prior to January first, nineteen hundred sixty, it shall be presumed that the paint or other similar surface-coating material in any dwelling unit where a child of applicable age resides or in the common areas of such multiple dwelling is lead-based paint.

(b) For purposes of the definition of lead-based paint set forth in section 27-2056.2(7)(b) of article 14 of the housing maintenance code and subdivision (t)(2) of section 11-01 of these rules, if such paint or other similar surface-coating material in a multiple dwelling erected prior to January 1, 1960 where a child of applicable age resides or in the common areas of such multiple dwelling, has not been tested by an x-ray fluorescence analyzer (XRF) and measured to be negative for lead-based paint in accordance with the performance characteristic sheet (PCS), or has been tested by an XRF and such test result is inconclusive in accordance with such PCS, and a laboratory analysis of a paint chip sample has not been performed, such paint is lead-based paint.

(c)(1) The presumption established in this section may only be rebutted as provided in paragraph (2) of this subdivision by the registered owner, registered officer or director of a corporate owner or by a registered managing agent of such multiple dwelling by submitting to the department:

(i) a sworn written statement, supported by XRF lead-based paint testing [sampling] results, including a description of the testing methodology and manufacturer and model of instrument used to perform such testing or [sampling] laboratory tests of paint chip samples;

(ii) a sworn written statement by the person who performed the testing or paint chip sampling if performed by an employee or agent of the owner which shall include a copy of the certificate of training as a certified lead-based paint inspector or risk assessor as provided in subdivision (d) of this section;

(iii) a copy of the inspection report provided by the person who performed the testing or paint chip sampling which shall include a description of the surfaces in each room where such testing or paint chip sampling was performed; and

(iv) a copy of the results of such testing [and/or] or such laboratory tests of paint chip samples performed by an independent laboratory certified by the state of New York where such [testing] paint chip sampling has been performed.

(2) Such written statement and all supporting documentation shall be submitted to the department not later than [six (6) days before] the date set for correction in the notice of violation in accordance with paragraph (1) of this subdivision, and may only be submitted to rebut the presumption where the department has not performed an XRF test prior to issuing such violation[. Receipt by the department of a complete application in accordance with this subdivision including such written statement and such supporting documentation shall toll the time period to correct the violation. Receipt of an incomplete application shall not toll the time period for correction of the violation] or where the department has performed an XRF test with a result classified as inconclusive for lead-based paint in accordance with the PCS.

(3) The department shall notify the registered owner, registered officer or director of a corporate owner or registered managing agent of such multiple dwelling of its determination in writing [, and, if the department determines that such presumption has not been rebutted, such notice shall set a date for correction of the violation].

[(c)] (d) Where x-ray fluorescence (XRF) testing or laboratory sampling is performed to rebut the presumption established in this section, the performance of such testing or sampling shall be in accordance with the applicable definition for lead-based paint established in §11-01(t) of these rules and §27-2056.2(7) of article 14 of the housing maintenance code. Laboratory

analysis for paint chip samples shall be permitted only where XRF tests fall within the inconclusive zone for the particular XRF machine or where the configuration of the surface or component to be tested is such that an XRF machine cannot accurately measure the lead content of such surface or component. Laboratory tests of paint chip samples, where performed, shall be reported in mg/cm², unless the surface area of a paint chip sample cannot be accurately measured, or if an accurately measured paint chip sample cannot be removed, in which circumstance the laboratory test may be reported in percent by weight as provided in such applicable lead-based paint definition. Where paint chip sampling has been performed, the sworn written statement by the person who performed the testing shall include a statement that such sampling was done in accordance with 40 CFR §745.227 or successor provisions.

[(d)] (e) Testing performed to rebut the presumption may only be performed by a person who has been certified as a lead-based paint inspector or risk assessor in accordance with subparts L and Q of 40 CFR part 745 or successor provisions and such testing shall be performed in accordance with 40 CFR §745.227(a) and (b), or successor provisions.

§ 3. Subdivisions (b), (e), and (f) of section 11-08 of chapter 11 of title 28 of the rules of the city of New York are amended to read as follows:

§11-08 Exemption from Presumption—Lead Free and Lead Safe.

(b) (1) Lead Free Exemption. A lead free exemption will be granted where such owner or such other person specified in subdivision (a) of this section submits a written determination made by a lead-based paint inspector or risk assessor certified pursuant to subparts L and Q of 40 CFR part 745 or successor provisions, and in accordance with 40 CFR §745.227(b), or Chapter 7 of the department of housing and urban development's Guidelines for Evaluation and Control of Lead-Based Paint Hazards in Housing (2012), that each tested surface and component in each dwelling unit in such multiple dwelling or in the individual dwelling unit, if applying for an exemption of a particular dwelling unit in such multiple dwelling, or in a common area of a multiple dwelling, (i) is free of lead-based paint, as defined] in accordance with the applicable definition for lead-based paint established in §11-01(t) of these rules and §27-2056.2(7) of article 14 of the housing maintenance code, or (ii) has been made free of lead-based paint through the complete removal of lead-based paint from any surface or component, or the removal or replacement of any surface or component that may have contained lead-based paint. In applying for a lead free exemption, such owner or other specified person shall confirm in the exemption application that, to the best of his or her knowledge, no surfaces in the dwelling unit, dwelling, or common area for which the exemption is sought that contain paint have been encapsulated or contained. X-ray fluorescent analyzer (XRF) readings submitted at 0.5 milligrams of lead per square centimeter that are inconclusive in accordance with the performance characteristic sheet will be presumed to contain lead-based paint unless the application contains a laboratory analysis of a paint chip sample of the surface from which the 0.5 XRF reading was taken that is negative for lead-based paint.

(2) Lead Safe Exemption. A lead safe exemption will be granted where the owner or such other person specified in subdivision (a) of this section submits a written determination made by a lead-based paint inspector or risk assessor certified pursuant to subparts L and Q of 40 CFR part 745 or successor provisions, and in accordance with 40 CFR §745.227(b), or Chapter 7 of the department of housing and urban development's Guidelines for Evaluation and Control of Lead-Based Paint Hazards in Housing (2012), that lead-based paint, in accordance with the applicable definition for lead-based paint established in §11-01(t) of these rules and §27-2056.2(7) of article 14 of the housing maintenance code, on each surface and component (i) in each dwelling unit from which lead-based paint was not fully removed or replaced, or (ii) in each

dwelling unit in a property if the exemption is based upon the appropriate sampling combination of components and surfaces in each unit, or (iii) in a common area of a multiple dwelling, has been contained so that each surface tested is negative for such lead-based paint or has been encapsulated. For purposes of this section, the term "contained" shall mean that every surface containing lead-based paint has been temporarily covered, enclosed and sealed with sheetrock or similar durable construction material to eliminate gaps which may allow access to or dispersion of dust or other matter from the underlying surface. XRF readings submitted at 0.5 milligrams of lead per square centimeter that are inconclusive in accordance with the performance characteristic sheet will be presumed to contain lead-based paint unless the application contains a laboratory analysis of a paint chip sample of the surface from which the 0.5 XRF reading was taken that is negative for lead-based paint.

(e)(1) Upon submission of a complete application for exemption to the department, such multiple dwelling or common area or other part thereof, or dwelling unit, the department shall review such application and notify the applicant whether the multiple dwelling, or common area or other part thereof, or dwelling unit, has been granted a lead safe or lead free exemption from application of the presumption established under article 14 of the housing maintenance code and §11-07 of these rules.

(2)(i) The department may revoke a lead safe exemption granted pursuant to this section where the department determines, after inspection, that a surface in any dwelling unit for which lead-based paint was contained or to which an encapsulant was applied is no longer intact or sealed.

(ii) The department may revoke a lead safe or lead free exemption upon failure by an owner to provide records related to encapsulation or containment monitoring as requested by the Department.

(3) The department shall revoke a lead safe or lead free exemption upon the:

(i) issuance of a denial of a rebuttal of a lead-based paint violation based upon the presumption of lead paint for such dwelling unit filed pursuant to subdivision a of section 27-2056.5 where the department finds that lead-based paint was present on a surface that was subject to such exemption,

(ii) issuance of a lead-based paint violation based upon testing by the department for such dwelling unit,

(iii) issuance of an order to abate lead-based paint hazards or unsafe lead-based paint by the department of health and mental hygiene,

(iv) issuance of a denial of an objection to such a commissioner's order to abate filed pursuant to section 173.13 of the health code, or

(v) issuance of a determination that the exemption was based upon fraud, mistake, or misrepresentation.

(4) For exemptions that were approved prior to [the effective date of the rule promulgated by the department pursuant to paragraph (b) of subdivision (7) of section 27-2056.2 of the administrative code] December 1, 2021 pursuant to the definition of lead-based paint in paragraph (a) of subdivision (7) of section 27-2056.2 of article 14 of the housing maintenance code and subdivision (t)(1) of section 11-01 of these rules, a lead free or lead safe exemption shall be deemed revoked upon the turnover of a dwelling unit [on or after such effective date and subject to subdivision (f) of this section] on or after December 1, 2021. Owners may continue to submit applications for exemptions using such definition of lead-based paint, provided that (i) the testing for lead-based paint was conducted prior to December 1, 2021, (ii) the complete application for exemption is submitted to the department on or before March 1, 2022 and (iii) there was or will be no turnover of the unit between December 1, 2021 and March 1, 2022. Exemptions that are granted using such definition of lead-based paint shall be deemed revoked upon the turnover of a dwelling unit after December 1, 2021.

(f)(1) On or after [the effective date of the rule promulgated by the department pursuant to paragraph (b) of subdivision (7) of section 27-2056.2 of the administrative code] December 1, 2021, an owner who had received [a lead free or lead safe] any exemption prior to such date must notify the department whenever an exempted unit becomes vacant. The exemption from the presumption for such vacant unit shall be deemed revoked on the date of the vacancy, regardless of whether an owner has failed to provide the required notification, and such unit shall be subject to all of the requirements of law relating to units that are not exempt from the presumption of lead-based paint. The owner of such unit may apply for a new exemption by submitting an application as provided in this section, and the testing required pursuant to this section shall be performed using the definition of lead-based paint in effect on and after [such date] December 1, 2021.

(2) An owner may also apply for a lead free or lead safe exemption [for the first time] on or after [the effective date of the rule promulgated by the department pursuant to paragraph (b) of subdivision (7) of section 27-2056.2 of the administrative code as provided in this section] November 1, 2021, and the testing required pursuant to this section shall be performed using the definition of lead-based paint [in effect on and after such date] in paragraph (b) of subdivision (7) of section 27-2056.2 of article 14 of the housing maintenance code and paragraph (2) of subdivision (t) of section 11-01 of these rules.

§ 4. This rule shall take effect on December 1, 2021, provided, however, that paragraph (2) of subdivision (f) of section 11-08 of chapter 11 of title 28 of the rules of the city of New York, as amended by section three of this rule, shall be deemed to have been in effect on November 1, 2021 for purposes of submission of exemption applications.