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THE FEDERAL LEAD POISONING PREVENTION PROGRAM: INADEQUATE GUIDANCE FOR AN EXPEDITIOUS SOLUTION

Jennifer L. Bush*

I. INTRODUCTION

The federal Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X)¹ and the subsequent Proposed Rules² and Task Force Report³ issued by the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) provide states with guidelines for the prevention and control of lead poisoning. Title X mandates creation of a federal regulatory infrastructure to reduce lead-based paint hazards in private housing.⁴ Moreover, federal agencies are meant to educate the public on the hazards and sources of lead poisoning so that owners will take steps to remove or

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reduce the hazards in their own dwellings. This Comment argues that Title X, the Proposed Rules, and the Task Force Report fail to provide the necessary legal and financial incentives to induce home owners to take such steps. Only a minority of states have developed comprehensive regulatory schemes that encourage abatement of lead-based paint in private housing, in part because of inadequate guidance from the federal government and its agencies.

This Comment explores why, in light of the passive role played by state and local governments in the area of lead-based paint regulation, the federal government should play a more active role in requiring and ensuring the safe elimination of lead hazards in private housing. Section II examines why lead poisoning is one of the most common and most preventable childhood health problems in the United States today. Section II also addresses how preventative testing for lead-based paint hazards in private housing is essential to an effective lead poisoning prevention program. Section III discusses legislative strategies regarding the means of ensuring and funding safe testing and abatement procedures. Section IV offers the Massachusetts regulatory scheme as an example of a comprehensive approach to these issues. Section V explores the federal government’s response to the problem of lead-based paint hazards in private housing. Specifically, section V concerns the lack of mandatory testing and requirements to abate lead-based paint hazards under current federal law. Finally, section VI of this Comment concludes with recommendations about how the federal government can provide state and local governments with the incentive and the means to enact comprehensive regulatory schemes aimed at preventing lead poisoning.

II. THE HEALTH HAZARDS OF LEAD POISONING

In 1991, the Secretary of the Department of Health and Human Services characterized lead poisoning as the “number one environmental threat to the health of children in the United States.” Approximately 57 million homes in the United States contain lead-based paint on interior or exterior surfaces. Deteriorating lead-based paint

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5 Id.; Proposed Requirements, supra note 2, at 54,985.
6 See CENTERS FOR DISEASE CONTROL, PREVENTING LEAD POISONING IN YOUNG CHILDREN 7–10 (1991) [hereinafter PREVENTING LEAD POISONING].
7 ALLIANCE TO END CHILDHOOD LEAD POISONING, PREVENTING CHILDHOOD LEAD POISONING: THE FIRST COMPREHENSIVE NATIONAL CONFERENCE; FINAL REPORT A–3 (Oct. 6–8, 1991).
8 OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP’T OF HOUS. AND URBAN DEV., COM-
and excessive amounts of lead-contaminated dust endanger children in an estimated 3.8 million homes. In these homes, lead poisoning affects three million children under the age of six. Although lead poisoning disproportionately affects minority and low-income children, “the disease does not respect geography or social station.” According to a report from the American Medical Association’s Counsel on Scientific Affairs, almost nine percent of all children under the age of six, and twenty-one percent of African-American children under the age of six, have blood levels within the toxic range.

A. Effects of Lead Poisoning

The health effects of lead poisoning vary according to the level of exposure. At low levels, lead poisoning causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, behavior problems, and interference with growth. These effects are particularly dangerous in that they are not evident on a standard clinical examination and thus often go undetected for long periods of time. Higher levels of lead exposure can cause blindness, brain damage, kidney disease, convulsions,
cancer, and even death. In addition, lead exposure before or during pregnancy can affect fetal development and cause miscarriages.

Children under the age of six are the most vulnerable to lead poisoning. Children absorb lead both by ingesting paint chips and by breathing in lead-contaminated house dust. Once ingested, the lead absorbs quickly into a child's system and adversely affects the child's developing blood-brain barrier of the neurological system.

Recent studies suggest that adverse health effects occur at blood-lead levels previously thought to be safe, resulting in a dramatic increase in the number of children recognized as lead-poisoned. As HUD reports in its proposed regulations, "there does not yet appear to be a discernible threshold for the adverse effects of lead on the young."


Medical experts characterize lead poisoning as a guileful disease because early manifestations often go unnoticed by parents, teachers,

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17 Landrigan & Todd, supra note 11, at 155.

18 Landrigan & Todd, supra note 11, at 157-58. According to the Agency for Toxic Substances and Disease Registry, over 500,000 pregnant women are exposed to toxic levels of lead each year. Residential Lead-Based Paint Hazard Reduction Act of 1992: Hearings on S. 2341 Before the Senate Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 102d Cong., 2d Sess. 114 (1992) [hereinafter 1992 Hearings] (testimony of Dr. Ellen K. Silbergeld, Professor of the University of Maryland, Program of Toxicology).

19 See Preventing Lead Poisoning, supra note 6, at 11 (“Children are more exposed to lead than older groups because their normal hand-to-mouth activities may introduce many nonfood items into their gastrointestinal tract.”); Jane Perkins, Lead Poisoning Problems Challenged on Many Fronts, 25 Clearinghouse Rev. 13, 15 (1991) (explaining that for children under six years old the blood-brain barrier of the neurological system still is developing).

20 Perkins, supra note 18, at 15 n.12. “Children absorb as much as 50 percent of the lead they ingest, compared to a rate of 10 percent in adults.” Id. (citing ATSDR, CASE STUDIES IN ENVTL. MED. LEAD TOXICITY 4, 5 (Mar. 1990)).

21 Proposed Requirements, supra note 2, at 54,985.
and health care providers.24 "By the time lead poisoning is clearly manifest, its damage is pervasive."25 In addition, there is no cure for a person afflicted with a high level of lead poisoning.26 Even if damage to a child can be mitigated, "the toxic effects of lead to the brain are poorly reversible."27 For these reasons, programs for prevention of lead poisoning are critical to the elimination of the disease.

Both legislatures and medical experts agree that, with effective programs, lead poisoning is completely preventable.28 The first, and perhaps the most important, step in the prevention of lead poisoning is identifying the lead-based paint hazards.29 Accordingly, a jurisdiction's strategy for testing lead-based paint often determines the jurisdiction's effectiveness in preventing lead poisoning.30

III. LEGISLATIVE STRATEGIES FOR THE PREVENTION OF LEAD-BASED PAINT POISONING

Federal, state, and local legislatures recognize the need to address the serious environmental health problem posed by lead-based paint.31 While all levels of government agree that testing for and removing lead-based paint from a child's environment is essential to the treatment of the disease, not all jurisdictions embrace preventative procedures designed to protect children from ingesting and inhaling lead in their homes.32 As of 1994, twenty-five states had statutes to regu-

24 1992 Hearings, supra note 17, at 115 (testimony of Dr. Ellen K. Silbergeld).
25 Id.
26 Id. at 120 (stating the difficulty in removing lead from the brain and compensating for damages because the brain does not repair itself).
27 Id. at 115.
28 See id. at 119.
29 Preventing Lead Poisoning, supra note 6, at 39.
late the presence of lead-based paint in private housing. Of those states, five required inspection of private housing before a child becomes ill and six had statewide programs to test children for elevated blood lead levels. Even in states with laws mandating testing, testing frequently is ignored. Moreover, only two states require lead abatement of private housing where children under the age of six reside or are expected to reside.

A. Different Methods of Testing for and Abating Lead Hazards

Some of the differences between jurisdictions in methods of testing for and abating lead hazards are due to the varying strategies jurisdictions adopt in combating lead poisoning. More specifically, some jurisdictions merely react to lead poisoning through health care while other jurisdictions take a more active approach aimed at preventing lead poisoning. HUD classifies state and local abatement laws as following either the "health approach" or the "housing approach."

The health approach consists of using resources to test children for elevated blood lead levels, treating afflicted children, and subsequently abating the hazard. The discovery of a poisoned child triggers action to avoid further injury to that child. Viewed as the most cost effective strategy to testing and abatement, most state and local governments use the health approach. Recently, however, commentators have highly criticized this reactive approach for its focus on reducing...
the consequences, rather than the source, of lead poisoning.\textsuperscript{43} As stated by one commentator, the health approach uses children as "mine canaries" and "lead detectors."\textsuperscript{44} In addition, the health approach risks exposing pregnant women whose fetuses' lead contents may not be detectable until irreparable injury occurs.\textsuperscript{45}

The housing approach, in contrast to the reactive health approach, focuses on the prevention of lead poisoning.\textsuperscript{46} Under the housing approach, jurisdictions develop systematic programs to test housing for impermissible concentrations of lead.\textsuperscript{47} Lead-based paint hazards in dwellings are abated regardless of the presence of a child or the condition of a child's health.\textsuperscript{48} Because abatement occurs before a child becomes ill, many commentators believe that the "housing approach" is the preferred public health approach\textsuperscript{49} and perhaps the only effective way to eliminate the problem of lead poisoning. Illustrative of the housing approach are the regulations currently enforced in Massachusetts.\textsuperscript{50}

Despite the low costs\textsuperscript{51} and importance of testing in the prevention of lead poisoning, mandated testing is often absent from federal, state, and local regulations.\textsuperscript{52} As of 1994, only five states provided for testing of dwellings for the presence of lead before a child becomes ill.\textsuperscript{53} One primary reason for the small number of comprehensive state lead

\textsuperscript{43} See Mahoney, supra note 30, at 55 ("[T]he prevention of poisoning of children can ever be characterized as prevention.").

\textsuperscript{44} Id. (quoting CONSERVATION LAW FOUND. OF NEW ENGLAND, INC., A SILENT AND COSTLY EPIDEMIC: THE MEDICAL AND EDUCATIONAL COSTS OF CHILDHOOD LEAD POISONING IN MASSACHUSETTS 7 (1987)).

\textsuperscript{45} See Perkins, supra note 18, at 13.

\textsuperscript{46} Advance Notice, supra note 30, at 19,212–13; see also Gilligan & Ford, supra note 30, at 261 n.116.

\textsuperscript{47} Advance Notice, supra note 30, at 19,212–13; see also Gilligan & Ford, supra note 30, at 261 n.116.

\textsuperscript{48} Mahoney, supra note 30, at 55. The housing approach is criticized for spending funds to remove lead paint in housing where children do not reside. See, e.g., 1975 Hearings, supra note 41, at 60–65. However, children often visit other homes where they could be exposed and could move into a new residence. Gilligan & Ford, supra note 30, at 270 n.195.

\textsuperscript{49} Gilligan & Ford, supra note 30, at 261 n.116.

\textsuperscript{50} MASS. GEN. LAWS ANN. ch. 111, §§ 189A–99B (Supp. 1994).

\textsuperscript{51} HUD estimates that the average cost of testing is $375 per home. Weicher testimony, supra note 11, at 62. Three methods most commonly used to test for lead-based paint include: 1) placing an X-ray florescence (XRF) machine on potential sites of lead-based paint; 2) removing and testing lead-based chips at a laboratory; and 3) using dust wipes, which are placed in a bag and sent to a laboratory for analysis. Schukoske, supra note 32, at 528 n.98.

\textsuperscript{52} See Tiller, supra note 33, at 268 n.25.

\textsuperscript{53} Id.
paint laws is the state legislatures' "fear[] of liability in uncharted territory." The most fundamental question facing state and local governments is how to fund lead abatement of private housing.

B. Who Will Fund the High Costs of Lead Abatement?

Federal law banned the use of lead-based paint in residential housing in 1978. Despite this prospective ban, ascertaining who is responsible for the removal of lead-based paint hazards in private housing still remains difficult. Property owners, lead manufacturers, and parents of poisoned children all resist responsibility for harm ema-

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55 See 1991 Hearings, supra note 31, at 167 (testimony of Joseph G. Schiff, Assist. Secretary for Pub. and Indian Hous., HUD) (acknowledging that states and local governments still have basic technical questions about how to test and abate cost-effectively). Other fundamental concerns include how to ensure lead abatement is done properly and effectively, and how to avoid massive liability. Id.
56 16 C.F.R. §§ 1303.1–5 (1993) (banning use of paints containing more than .06% by weight of lead).
57 Schukoske, supra note 32, at 522–25. A similar problem exists with other environmental hazards. The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) imposes strict liability on all responsible parties, including those who owned or operated facilities at the time disposal of hazardous substances occurred, those who presently own or operate such a facility, generators of a hazardous substance, transporters who selected the facility where the substance was transported, and parties who arranged for transport, disposal, or treatment of hazardous substances. 42 U.S.C. § 9607(a). CERCLA does not apply to the cleanup of lead-based paint hazards in residences. See id. § 9601(9).
58 See, e.g., Norwood v. Lazarus, 634 S.W.2d 584, 587 (Mo. Ct. App. 1982) (holding landlord liable for child's poisoning where he had seen child playing in hallway containing lead paint). Regarding personal injury suits against landlords in New York City, one landlord argued to a local newspaper that landlords should not be held accountable for problems created years earlier and expressed concern that poisoning could occur from lead in dirt on the street and on playgrounds. Matthew Purdy, Cost of Lead Cleanup Puts More Poor Children at Risk, N.Y. Times, Aug. 25, 1994, at B1.
60 See, e.g., Davis v. Royal-Globe Ins. Co., 223 So.2d 912, 918 (La. Ct. App. 1969) (recognizing that parent's failure to supervise her child could be superseding cause of child's injuries); Caroline v. Reicher, 304 A.2d 831, 834 (Md. App. 1973) (holding that parent's negligence was not superseding cause of child's injury where it did not reach extraordinary threshold). But see Ankiewicz v. Kinder, 563 N.E.2d 684, 686–87 (Mass. 1990) (holding that landlord could seek contribution from mother whose child ingested lead-based paint). For an in-depth discussion of lead paint manufacturers' attempts to limit their liability through claims of parental negligence, see Diane C. Freniere, Private Causes of Action Against Manufacturers of Lead-Based Paint:
nated years earlier. While courts struggle to find culpability among innocent parties, state and local legislatures attempt to prevent lead poisoning and to limit personal injury litigation by enacting regulatory schemes governing the funding of lead abatement.

Property owners are the primary group responsible for financing the abatement of lead-based paint hazards in private housing. One economic analysis demonstrates that the cost of abatement already is calculated into market prices because owners account for the cost of lead abatement either as a business expense, through a discounted offering price, or through the increased value of a lead-free apartment. Moreover, public policy suggests that property owners should be responsible for the condition of the property from which they reap economic benefits in the form of both rent and tax deductions. Finally, property owners have the most control over their premises, as the final decision to abate or abandon the housing remains up to them.

Property owners argue that they should not have to pay the high costs of abating lead-based paint which may have been applied to housing years before they purchased it. Although some states attempt to minimize costs through tax credits and deductions, property owners still incur the majority of lead abatement costs. In addition, owners are frustrated with the lack of uniformity in lead abatement standards. For example, in 1971, Massachusetts required owners of target housing to remove intact paint from doors, door frames, and


Parties often feel innocent for past harms that they did not cause or know about. Id. This is certainly not to say that all parties in lead paint litigation are blameless.

See, e.g., MASS. GEN. LAWS ch. 111, § 194.

Property owners are also the primary group responsible for financing abatement in housing subsidized by a federally guaranteed mortgage or rent subsidy program. See 24 C.F.R. §§ 35.24(b)(1)(iv), (b)(2) (1986). In order to apply for these programs, the owner must abate the lead-based paint in the housing. Id.

Gilligan & Ford, supra note 30, at 287-90.

See id. at 290.

HUD estimated abatement costs range from $2,900 to $7,700. For priority hazards where paint is peeling and lead dust is present, the costs range from $4,200 to $10,400 to abate. 1991 Hearings, supra note 31, at 110-11.

See supra note 58.

See, e.g., MASS. GEN. LAWS ANN. ch. 62 § 6(e) (Supp. 1995).

See Purdy, supra note 58, at B1. Harold M. Shultz, Deputy Commissioner for Housing Preservation in New York City was reported as saying, "There's a great deal of reason to be concerned. The problem is constantly being redefined. An apartment that was safe before becomes unsafe." Id.
windows below the four-foot level.\textsuperscript{71} Yet, in 1987, the same owners were expected to remove the intact paint one foot higher when the legislature raised the target height to five feet.\textsuperscript{72} Soon an owner will be allowed to contain lead paint with an encapsulate, a much easier and cheaper form of lead abatement.\textsuperscript{73} Property owners, uncertain of what action is needed for compliance and apprehensive that amended legislation will require less costly methods of lead abatement, resist immediate compliance. Even more drastic, some landlords threaten that they will no longer invest in housing in low-income neighborhoods if the cost of lead abatement continues to rise.\textsuperscript{74}

Some commentators argue that manufacturers of lead-based products, not property owners, should help pay for lead abatement.\textsuperscript{75} In August 1994, the United States Senate Finance Committee considered placing a forty-five cent tax on each pound of lead used by United States manufacturers.\textsuperscript{76} Money raised from the tax would be targeted toward removing hazardous lead-based paint from inner-city houses nationwide.\textsuperscript{77} Manufacturers argue that the tax is unfairly overinclusive because lead-based paint has not been used in housing since 1978 and many manufacturers of lead-based products today have no con-

\textsuperscript{73} Mass. Gen. Laws Ann. ch. 111, § 197A (1994). Encapsulation involves covering the lead paint with an approved encapsulant, such as paint, plastic, etc. The paint remains in the house but the encapsulant prevents lead contamination. Average encapsulation costs $2,908, according to HUD. See Schukoske, supra note 32, at 521 n.58 (citing Dewberry & Davis, U.S. Dept of Hous. & Urban Dev., The HUD Lead-Based Paint Abatement Demonstration (FHA) II-7 (1991)).
\textsuperscript{74} See Purdy, supra note 58, at B1. This situation is most likely to happen with low-income housing which in many cases is cheaper to abandon than to abate. For example, Mark Schmelzer, a New York City landlord stated that he decided not to buy a 100-unit apartment building in Harlem earlier this year because of the high costs of rehabilitating each unit to comply with all federal, state, and city lead regulations. Schmelzer claimed that the lead removal would have added $3,000 to $4,000 to the cost of rehabilitating each unit, and insurance to cover liability from lead injuries would have added another $100,000. Id.
\textsuperscript{75} See Freniere, supra note 60, at 420; Schukoske, supra note 32, at 562; see also Pare, supra note 59, at 8 (quoting Dr. Bela T. Matyas, Medical Director of R.I. Department of Health as supporting plan that would force lead manufacturers to take some responsibility).
\textsuperscript{76} See Pare, supra note 59, at 8.
\textsuperscript{77} Id.; see also Lead-Based Paint Hazard Abatement Act: Joint Comm. on Taxation, Description of H.R. 2922 (Lead Based Paint Hazard Abatement Act) 26–92 (June 30, 1992) [hereinafter Joint Comm. on Taxation] (proposing Lead Abatement Trust Fund, financed by excise tax on lead produced in or imported into the United States and proposing that expenditures from the fund would be used for grants to state and local governments for abatement of hazards associated with lead-based paint in low-income housing and day care centers).
nection to the production or distribution of house paint. In addition, manufacturers argue that lead is a critical element needed for such useful activities as medical research and treatment and such a tax would undermine society's interest in lead production. An alternative method of requiring manufacturers of lead-based products to take responsibility for the present condition of American housing is to ban the use of all lead-based paint. Although the use of lead-based paint for internal residential use was banned in 1978, at present, lead-based paint may be used on exterior surfaces of housing and for steel structures.

Finally, other commentators believe that rather than property owners or manufacturers, the federal government should help finance the abatement of lead-based paint in private housing. According to HUD, the inspection and abatement of all target homes containing lead would cost $7.6 to $9.9 billion per year for ten years. In response to this high cost, Congress expanded its federal grant program to encourage property owners to undergo lead abatement in private housing. Under § 4852 of the Residential Lead-Based Hazard Reduction Act (the Act), the Secretary of HUD, acting through the authority of the Centers for Disease Control and Prevention (CDC), makes grants to states and their political subdivisions for the initiation and expansion of community programs on the education and prevention of lead poisoning in priority housing that is not federally assisted, federally owned, or public.

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78 See Joint Comm. on Taxation, supra note 77, at 10–11.
79 See id.
80 See 1992 Hearings, supra note 17, at 125–26 (testimony of Ellen K. Silbergeld) (suggesting that Congress should ban use of all lead-based paint, reasoning that exterior painted surfaces cause contamination of surface soil which is tracked into houses, and painted steel structures cause poisoning of workers and contamination of local environments).
82 See Title X, supra note 1, § 4851b. More housing has lead paint on exterior than interior surfaces. Weicher Testimony, supra note 11, at 61.
83 HUD Plan, supra note 8, at 4–20.
84 See Title X, supra note 1, § 4852; Senate Report, supra note 54, at 115. The secondary purpose in expanding the grant program is to "jump start the private market's response to lead paint hazards," by providing incentives for entrepreneurs to enter the lead paint prevention business. See Senate Report, supra note 54, at 116. A discussion on the effects of this expansion is beyond the scope of this Comment.
85 "Priority housing" means target housing that qualifies as affordable housing under § 215 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 12745), including housing that receives assistance under subsections (b) or (o) of § 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437a(b)(1)). Title X, supra note 1, § 4851b(20).
86 Title X, supra note 1, § 4852.
Under the Act, the Secretary of HUD only awards grants to states or local governments whose proposed activities likely will reduce the risk of lead poisoning to children. The Secretary of HUD considers factors such as the severity of lead-based paint hazards in the jurisdiction, the applicant’s ability to leverage other supplementary funds, and the applicant’s ability to carry out the proposed activities. The Act also requires that the grant only be used for risk assessment, lead abatement, and educational activities.

The $500 million grant program has the effect of making the federal government an “integral part” of state and local housing strategies. By awarding funds on the basis of the proposed activities’ merits and the severity of the lead-paint hazards in each jurisdiction and by limiting the use of such funds to specific activities, the grant program is designed to evaluate and monitor state and local lead-based paint inspection and reduction programs. In theory, the program ensures the effectiveness of the recipients’ activities.

In practice, however, many states that receive federal grants do not have effective programs for reducing lead-based paint hazards in their jurisdictions. Although the Act regulates the activities for which the grant may be used, the Act gives no guidelines or criteria on how to conduct those activities. Thus, states and local governments alone are left to decide how to test and abate safely and cost-effectively. Moreover, the Act only states what the grant may be used for and thus does not require the funds to go towards any one of the eligible activities. The result in most states is inefficient and

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87 Id. § 4852(d)(1).
88 Id. §§ 4852(d)(2)-(5).
89 Id. § 4852(e). Such uses include performing risk assessments and inspections in priority housing, providing interim control and abatement of the hazards, providing for additional costs of reducing lead-based paint while renovating, ensuring that programs are carried out by certified contractors, monitoring blood levels of lead hazard reduction workers, assisting in temporary relocation of families, educating the public, and testing both the environment and children under six residing in priority housing after reduction activities are conducted. Id.
90 1992 Hearings, supra note 17, at 3.
91 See id. Title X requires the applicant to submit an annual report describing the use of the funds and stating the number of inspections, abatements, risk assessments, and hazard reductions to the Secretary. See Title X, supra note 1, § 4852(1).
92 See Senate Report, supra note 54, at 116.
93 See supra notes 34–37 and accompanying text.
94 See Title X, supra note 1, §§ 4852(a)-(o).
95 See 1992 Hearings, supra note 17, at 167 (testimony of Joseph G. Schiff) (arguing that, because of enduring basic technical questions about how to test and abate safely and cost-effectively, state and local governments should not receive a dramatic increase in federal funding).
96 42 U.S.C. § 4852(e).
unorganized plans for the prevention of lead poisoning. The Massachusetts legislature, however, chose a different course of action. Recognizing the importance of an effective lead-based hazard reduction program, the Massachusetts legislature began a comprehensive regulatory scheme as early as 1971.

IV. MASSACHUSETTS REGULATIONS: ENACTING THE HOUSING APPROACH

Using Massachusetts as a model, the federal government can provide financial and legal incentives to private owners to abate, while at the same time ensuring safe abatement techniques. Massachusetts is known nationwide as a pioneer in the prevention of lead poisoning. Since Massachusetts passed the first state statute aimed at removing lead-based paint in 1971, Massachusetts has continued to incorporate an aggressive "housing approach" in its regulations. The Lead Poisoning Prevention and Control Act (the Massachusetts Act) establishes a scheme that ensures systematic inspection and identification of housing containing lead-based paint. Moreover, the Massachusetts Act requires removal of lead-based paint before a child becomes ill. The Massachusetts Act's effectiveness stems from this unique focus on both the treatment and the prevention of lead poisoning.

The Massachusetts Act places the duty and financial burden of lead abatement on the property owner. Under the Massachusetts Act, the property owner must abate lead-based hazards from a premises if a child under the age of six resides or is expected to reside at the premises. When the premises undergoes a change of ownership, and as a result a child under six years of age will become or will continue to be a resident, the duty of abatement shifts to the new owner.

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97 See Tiller, supra note 33, at 267.
100 See id. §§ 189A-99B.
101 Id. § 197(a).
102 The Massachusetts regulatory scheme is the most effective lead poisoning prevention program in the country. See Tiller, supra note 33, at 267; Mahoney, supra note 30, at 61–64.
103 MASS. GEN. LAWS ANN. ch. 111, § 190.
104 "Owner" is defined as one in actual physical possession of property. Thus a mortgagee who only collected rents, through assignment of rents, was not an owner for purposes of this statute. Commonwealth v. Advantage Bank, 550 N.E.2d 1388, 1390 (Mass. 1990).
105 MASS. GEN. LAWS ANN. ch. 111, § 197. When the premises undergoes a change of ownership, and as a result a child under six years of age will become or will continue to be a resident, the duty of abatement shifts to the new owner. Id.
the rent for a substitute dwelling which exceeds that of the vacated dwelling.\textsuperscript{106}

Under the Massachusetts Act, property owners who undergo the high costs of lead abatement may have financial assistance. For example, owners may credit and deduct part of the lead abatement costs for tax purposes.\textsuperscript{107} Property owners also may apply for loans to help with lead abatement and containment expenses.\textsuperscript{108} In addition, the 1994 amendment to the Massachusetts Act establishes an interim control program which permits property owners who have received a letter of interim control issued by a licensed inspector to abate lead hazards on an interim basis until reaching full compliance within two years.\textsuperscript{109} Property owners also may avoid the high costs of removing and replacing lead-based paint hazards simply by containing the hazards with an approved encapsulant.\textsuperscript{110} Containment is a cheaper and easier procedure than full abatement and also may be safer because it avoids the risks of dispersing lead dust particles into the dwelling.\textsuperscript{111}

The Massachusetts regulatory scheme also ensures safe lead abatement. The Massachusetts Act specifically describes the methods of performing interim control measures and complete containment or lead abatement required for full compliance with the law.\textsuperscript{112} The Massachusetts Act requires that only licensed contractors or those who have completed an approved instruction course perform lead abatement activities.\textsuperscript{113} The Massachusetts Act also requires that occupants be removed from premises undergoing dangerous deleading activities.\textsuperscript{114} These regulatory mandates have resulted in an expanded in-

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Mass. Gen. Laws Ann.} ch. 62, § 6(e) (Supp. 1995) (increasing tax credit for abatement expenses from $1,000 to $1,500 per dwelling unit).

\textsuperscript{108} \textit{Mass. Gen. Laws Ann.} ch. 111, § 197E. The statute requires the establishment of a loan program in “the executive office of communities and development for lead abatement throughout the commonwealth . . . to assist residential property owners in financing the abatement and containment of lead paint hazards." \textit{Id.} Funds are distributed through community action agencies, redevelopment agencies, local non profit communities, and housing agencies and other appropriate organizations. \textit{Id.} Under the direction of the statute, Massachusetts has established a comprehensive abatement loan program. \textit{See Mass. Reg. Code} tit. 751, § 12.00 et seq. (July 14, 1994).

\textsuperscript{109} \textit{Mass. Gen. Laws Ann.} ch. 111, §§ 197(b), (c).

\textsuperscript{110} \textit{Id.} § 197(a). The encapsulant covers the lead paint preventing lead contamination.

\textsuperscript{111} \textit{See Preventing Lead Poisoning, supra note 6, at 73. Containment will become a viable option for property owners as soon as an encapsulant is approved by the Department of Public Health. Tiller, supra note 33, at 272.}


\textsuperscript{113} \textit{Id.} § 197(d).

\textsuperscript{114} \textit{Id.} §§ 197(g), (h). Occupants only may remain if the director or local board of health finds
that occupancy will not “endanger or materially impair” their health or well-being. Pregnant women and children under the age of six, however, always are prohibited from occupying the premises during deleading activities. Id.

115 1991 Hearings, supra note 31, at 251 (written testimony of Stephanie Pollack). In Massachusetts, stricter regulation initially resulted in cost increases for abatement. The mandates, however, assured work in the deleading industry and thus encouraged private individuals and companies to enter the industry. As the industry grew, competition for work brought prices down. The per unit cost of abatement in Lynn, Massachusetts dropped from an average of $5,000/apartment to $3,000/apartment in 1991. Id.

116 MASS. GEN. LAWS ANN. ch. 111, § 197A.

117 Id.

118 MASS. GEN. LAWS ANN. ch. 111, §§ 197(c), 198.

119 Tiller, supra note 33, at 271 & n.41 (citing OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS, REPORT OF THE ATTORNEY GENERAL’S LEAD POISONING TASK FORCE 1 (1992)).

120 Id.

121 MASS. GEN. LAWS ANN. ch. 111, § 199A.

122 See id. § 197C(b). Before, owners who could not afford full abatement may have been tempted not to test or disclose the lead hazards, risking the health of occupants. Currently, the
The Massachusetts lead-based paint regulations represent a dedication to the prevention of lead poisoning through the removal of lead-based paint in housing before a child becomes ill. The law demands that property owners take responsibility for their own premises and for the health of the people who pay to reside there. At the same time, loans and tax advantages give property owners the economic means to delead safely, thereby encouraging investment in private housing. As one commentator noted, "the system is designed to be 'self-enforcing'—property owners are increasingly choosing to comply with the lead laws in order to gain the benefits (such as tax credits, tenants with housing subsidies and/or relief from potential liability)." In sum, Massachusetts's pioneering lead poisoning prevention laws protect children endangered by deteriorating lead paint while balancing the competing interests of landlords and public health officials.

V. FEDERAL RESPONSE TO THE PREVENTION OF LEAD POISONING: A STEP IN THE RIGHT DIRECTION

In light of the inability of medical treatment to undo lead poisoning damage, abatement of lead hazards remains a necessary step in the prevention of lead poisoning. Both the housing approach and the health approach require eventual abatement. Medical research confirms the necessity of abating lead-based paint from housing as an essential part of treating and preventing the disease. Depending on the method used, however, abatement can be both expen-

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statute reads, "[i]n no event shall an owner in possession of a letter of interim control be held strictly liable for injury or damage caused by exposure to dangerous levels of lead during such time the letter of interim control is in effect." Id.

123 See MASS. GEN. LAWS ANN. ch. 111, §§ 197-99B.
124 See supra text accompanying notes 107-08.
125 1991 Hearings, supra note 31, at 251 (written testimony of Stephanie Pollack).
126 See supra section II.
127 See PREVENTING LEAD POISONING, supra note 6, at 65.
128 See supra text accompanying notes 38-49.
130 Congress defines "abatement" as any set of measures designed permanently to eliminate lead-based paint hazards. 42 U.S.C. § 4851(b)(1). Methods of abatement include: 1) removal of all lead-based paint and lead contaminated dust; 2) the permanent containment or encapsulation of lead-based paint; 3) the replacement of lead painted fixtures or surfaces; and 4) removal or covering of lead contaminated soil. Id.
sive\textsuperscript{131} and dangerous.\textsuperscript{132} Regulations are therefore critical for both ensuring safe abatement and for providing funding to private owners.\textsuperscript{133} Regulations also are necessary to establish a framework for providing legal and financial incentives to induce property owners to undertake the high costs of lead abatement.\textsuperscript{134} Until recently, however, the federal government and its agencies have been reluctant to oversee lead abatement activities, choosing instead to delegate the task to state legislatures.\textsuperscript{135} The following section examines the federal government's general reluctance to intervene in state and local lead poisoning prevention programs and how this hesitancy has impeded the "national goal of eliminating lead-based paint hazards in housing . . . as expeditiously as possible."\textsuperscript{136}

A. A Summary of Past Federal Action

In 1971, Congress recognized the importance of testing and abatement to lead poisoning prevention in the Lead-Based Paint Poisoning Prevention Act.\textsuperscript{137} In the Act and its subsequent amendments,\textsuperscript{138} Congress directs the Secretary of HUD to "develop and carry out a demonstration and research program to determine the nature and extent of the problem of lead-based paint poisoning in the United States . . . and the methods by which lead based paint hazards can


\textsuperscript{132} Proposed Requirements, supra note 2, at 54,985. "Cleaning and renovation activities can actually increase the threat of lead-based paint exposure by dispersing fine lead dust particles in the air and over accessible household surfaces." Id. A New York Times article described a common situation where abatement activities increased rather than decreased lead paint hazards. "A maintenance worker was in the kitchen scraping paint off a pipe and window sill. There was no apparent effort to protect the furniture, and an open pot of meat was being prepared on the stove." Purdy, supra note 58, at B1.

\textsuperscript{133} See 1991 Hearings, supra note 31, at 250–52 (written testimony of Stephanie Pollack) (discussing how stringent lead paint regulations in Massachusetts ensure safer and cheaper abatement procedures).

\textsuperscript{134} See Tiller, supra note 33, at 268; Mahoney, supra note 30, at 61. For example, in Baltimore, a program that provided grants and loans to property owners who undertook abatement activities virtually went unused for the first year because Maryland had no state lead paint law requiring abatement. Mahoney, supra note 30, at 61.


\textsuperscript{138} Id.
most effectively be removed.”\textsuperscript{139} HUD responded in 1990 by issuing its Comprehensive And Workable Plan For The Abatement Of Lead-Based Paint In Privately Owned Housing (the Plan).\textsuperscript{140} The Plan contains estimates of the amount of lead-based paint in private housing and the potential costs of testing and abating each home, as well as recommendations for federal action.\textsuperscript{141} Yet, because it lacks specific implementation procedures and financing mechanisms, the Plan failed to reduce significantly lead-based paint poisoning in private housing.\textsuperscript{142}

B. Title X: A Transition from the Health Approach to the Housing Approach

In 1992, in response to the growing awareness of the lead poisoning problem in private housing, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act (Title X).\textsuperscript{143} Title X represents an expanded federal commitment to the prevention of lead-based paint in private as well as public housing.\textsuperscript{144} Under Title X, Congress explicitly adopts a housing approach that seeks to prevent, rather than simply to treat, lead poisoning.\textsuperscript{145} The stated purpose of Title X is to develop a national strategy to support more cost-effective and practical strategies for the identification, disclosure, and elimination of lead-based paint hazards.\textsuperscript{146}

In accordance with its cost-effective and practical focus, Congress directs federal efforts and resources toward the identification of ac-

\textsuperscript{139}\textit{Id.}
\textsuperscript{140}\textit{HUD PLAN}, \textit{supra} note 8, at 5–16.
\textsuperscript{141}\textit{Id.}
\textsuperscript{142} \textit{See 1992 Hearings, supra note 17, at 2 (opening statement of Senator Alan Cranston).}
\textsuperscript{143} “Despite two decades of Congressional mandates . . . the Federal Government still lacks a comprehensive, coherent and cost effective strategy to reduce the hazards of lead-based paint.” \textit{Id.}
\textsuperscript{144} As in accordance with the specific direction of Congress under 42 U.S.C. § 4822, has developed a comprehensive and mandatory testing and abatement plan for public housing. 55 Fed. Reg. 14,556 (1990). HUD’s regulations require testing “of all intact and non-intact interior and exterior painted surfaces of all pre-1978 public housing family projects,” abatement of structures containing lead-based paint and relocation of tenants during abatement. A discussion of the Plan’s effects on lead-based paint in public housing is beyond the scope of this Comment.
\textsuperscript{146} \textit{See id.}
\textsuperscript{147} \textit{Id.} “Guidelines shall be based upon criteria that measure the condition of the housing (and the presence of children under age 6 for the purposes of risk assessment) and shall not be based upon criteria that measure the health of the residents of the housing.” \textit{Id.}
\textsuperscript{148} \textit{SENATE REPORT, supra note 54, at 111.} “It should be made clear at the outset that Title X is not intended to ‘solve’ the vast problem of childhood exposure to hazardous amounts of lead from residential lead-based paint.” \textit{Id.} Title X instead calls for the development of “a
tual, not potential hazards.\textsuperscript{147} Congress hopes that this focus will reduce the cost of inspection and abatement. For example, Congress revised the definition of “lead-based paint hazard” in Title X to include only lead-based paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces.\textsuperscript{148} Under this definition, intact lead-based paint on walls in a kitchen, bathroom, or child’s bedroom does not constitute a hazard.\textsuperscript{149} Congress reasoned that, although lead-based paint in such areas has the potential to become hazardous,\textsuperscript{150} such paint poses no immediate health threat to children.\textsuperscript{151} Moreover, Congress believed that this narrower definition would reduce the cost of inspection and abatement to private owners.\textsuperscript{152} The price paid for such cost-efficiency, however, may prove to be increased and more costly health hazards.\textsuperscript{153} Despite Congress’s conclusion that intact lead paint poses no immediate threat, in the absence of regular maintenance, intact surfaces can generate harmful lead dust, especially when disturbed by aging or leaking pipes or roofs, or sudden abrasion.\textsuperscript{154}

Once a lead-based paint hazard is identified, Title X governs the circumstances under which disclosure of the hazard is required. On November 2, 1994, the EPA and HUD, under the specific direction of national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible.” Title X, \textit{supra} note 1, § 4851(a)(1).

\textsuperscript{147} \textit{See} \textit{Task Force Report}, \textit{supra} note 3, at 39.

\textsuperscript{148} Title X, \textit{supra} note 1, § 4851b(15). The statute reads, “[t]he term lead-based paint hazard means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency.” \textit{Id.} An “accessible surface” is an “interior or exterior surface painted with lead-based paint that is accessible for a young child to mouth or chew.” \textit{Id.} § 4851b(2). A “friction surface” is a “surface that is subject to abrasion or friction, including certain window, floor and stair surfaces.” \textit{Id.} § 4851b(10). An “impact surface” is an “interior or exterior surface that is subject to damage by repeated impacts.” \textit{Id.} § 4851b(11).

\textsuperscript{149} \textit{See id.} § 4851b.

\textsuperscript{150} \textit{Senate Report}, \textit{supra} note 54, at 112 (recognizing the danger if water damage caused paint to crack on an interior wall).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 112-13. “It is hoped that this change will permit resources to be targeted more cost-effectively resulting in a greater number of abatements of actual hazards performed with little additional risk of poisoning.” \textit{Id.}


\textsuperscript{154} \textit{Preventing Lead Poisoning}, \textit{supra} note 6, at 36.
Title X,155 issued proposed regulations for the disclosure of lead-based paint hazards in target housing156 being offered for sale or lease.157 The proposed regulations would obligate the seller or lessor, or any agent acting on their behalf, of most pre-1978 residential housing158 to disclose to the purchaser or the lessee the presence of any known lead-based paint and lead-based paint hazards in such housing.159 The proposed regulations also would require the seller or the lessor to provide the purchaser or the lessee with an EPA pamphlet entitled, Lead Paint: Protect Your Family.160 Furthermore, the proposed regulations require sellers to grant purchasers a ten-day period to conduct an inspection or risk assessment for lead-based hazards “before a party is obligated under any contract to purchase target housing.”161 The regulations also would require sellers to attach “a standard warning, disclosure, and acknowledgment form” to all leases and sales contracts involving target housing.162 The purpose of the proposed regulations is as follows:

[T]o ensure that families are aware of: 1) the existence of lead-based paint or lead-based paint hazards in target housing, (2) the hazards of exposure to lead-based paint, and (3) ways to avoid such exposure before they become obligated to purchase or lease housing that may contain lead-based paint.163

By requiring disclosure and warning forms on all leases and sales contracts involving target housing, Congress hopes to encourage the public to protect its health by avoiding housing with lead-based paint

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155 Title X, supra note 1, § 4852d.
156 “Target housing” is defined in § 4851b as housing constructed prior to 1978, excluding elderly or disability housing where children under six do not, or are not, expected to reside, and studio and zero-bedroom dwellings.
157 Proposed Requirements, supra note 2, at 54,984.
158 The regulations exclude zero bedroom apartments and elderly dwellings. Id.
159 Specifically, the regulations require the disclosure of “all information known to the seller or lessor on lead-based paint and lead-based paint hazards.” Id. at 54,988. The proposed information would include reports from all known lead-based paint inspections, risk assessments, and abatement activities conducted on or in the target housing, records of such inspections in common areas of target housing containing more than one residential dwelling, known information regarding whether other residential dwellings in the target housing contain or have contained lead-based paint hazards, and other relevant available information that may indicate lead-based paint. Id.
160 Proposed Requirements, supra note 2, at 54,989. The pamphlet’s primary purpose is to educate families on the potential risks associated with lead exposure and methods of avoiding such exposure. Id.
161 Id. at 54,991.
162 Id. at 54,989–91.
163 Id. at 54,986.
or by abating the lead hazards. As one commentator noted, "the opportunity for hazard discovery should, over time, affect rental and home buying choices and lead to gradual cleanup of the nation's housing stock."\textsuperscript{164}

\section*{C. Task Force Recommendations}

In addition to mandating the promulgation of disclosure regulations, Title X also directs the EPA and HUD to establish a Task Force on Lead-Based Paint Hazard Reduction and Financing (Task Force).\textsuperscript{165} In 1995, the Task Force issued a final report on its recommendations.\textsuperscript{166} The Task Force report proposes benchmark standards of lead-based paint maintenance and control in private housing. The standards require all owners of pre-1978 rental housing that contains lead-based paint to perform essential maintenance and management practices,\textsuperscript{167} to undertake additional action when a child resident has an elevated blood lead level (EBL),\textsuperscript{168} and to control identified lead-based paint hazards.\textsuperscript{169} Under this regime, all identified lead hazards either must be abated or controlled through interim measures immediately if a child under six or a pregnant woman occupies the premises; otherwise, the property owner may postpone control activity.\textsuperscript{166}

\textsuperscript{164} Schukoske, supra note 32, at 549. Louis Bevilacqua, a regional lead coordinator for the EPA also commented that the notification requirement will result in a better protected population by allowing for an informed purchase. Denn, supra note 36, at B1.

\textsuperscript{165} 42 U.S.C. § 4852.

\textsuperscript{166} See Task Force Report, supra note 3, at 2–17.

\textsuperscript{167} The Task Force Report defines "Essential Maintenance Practices for Property Owners" as including the following: (1) using safe work practices when disturbing paint that may contain lead; (2) performing regular, visual examinations for deteriorating paint; (3) promptly and safely repairing deteriorated paint and the cause of the deterioration; (4) providing generic lead-based paint hazard information to tenants per Title X; (5) posting written notice to tenants requesting that tenants report deteriorating paint and informing tenants whom to contact; and (6) training maintenance staff. Id. at 67 (Exhibit 3–2).

\textsuperscript{168} "Actions in Response to Notification of an EBL Child" include the following steps: (1) cooperating with local public health (or housing department) authorities; (2) obtaining a risk assessment; (3) controlling all lead-based paint hazards; (4) notifying affected tenants of risk assessment results and any hazard control actions taken; (5) not retaliating against tenants in response to the identification of an EBL child; and (6) relocating the tenant if lead-based paint hazards are not controlled promptly. Id. at 68 (Exhibit 3–3).

\textsuperscript{169} The following steps ensure "Control of Identified Lead-Based Paint Hazards:" (1) controlling interior hazards in units occupied by a child under the age of six or a pregnant woman before 30 days; otherwise the property owner may wait until unit turnover; (2) controlling the hazard by interim controls or abatement; (3) avoiding unsafe work practices; (4) taking precautions to protect occupants and their belongings from lead exposure during control measures; and (5) performing dust testing at the conclusion of controlling the lead-based paint hazard. Id. at 70 (Exhibit 3–4).
until unit turnover.\textsuperscript{170} The report classifies units built before 1950 as "higher priority" and subjects such units to additional requirements. Owners of higher priority units also must perform risk assessments and must control all identified lead-based paint hazards\textsuperscript{171} or regularly perform a set of "Standard Treatments."\textsuperscript{172}

The Task Force's recommended benchmark standards do not carry the force of law and are not self-executing.\textsuperscript{173} Recognizing that alone the recommendations lack the ability to alter the behavior of rental property owners, the Task Force recommends incorporating the benchmark standards into state and local laws and regulations.\textsuperscript{174} In addition, the Task Force recommends that state and local governments provide incentives for property owner compliance by using the standards as the basis for offering financial assistance and/or liability limitation to rental property owners.\textsuperscript{175}

Significantly, the Task Force calls for active participation by the federal government in facilitating the adoption of the benchmark standards.\textsuperscript{176} The Task Force encourages federal agencies, such as the EPA, HUD, and the CDC, to take several steps in recognizing and supporting the benchmark standards for rental housing.\textsuperscript{177} For example, the agencies should endorse the benchmark standards and encourage their implementation by insurers, lenders, private organizations, state legislatures, courts, and property owners.\textsuperscript{178} HUD also should use the standards in its regulations for federally subsidized programs, requiring compliance with the standards for recipients of the programs.\textsuperscript{179} In addition, the Task Force recommends that HUD sponsor a project with model code organizations to incorporate the benchmark standards into model housing and building codes.\textsuperscript{180} Lastly,

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{TASK FORCE REPORT}, \textit{supra} note 3, at 72.

\textsuperscript{172} \textit{Id.} at 2. "Standard Treatments" consists of the following steps: (1) safely repairing deteriorated paint; (2) providing smooth and cleanable horizontal surfaces; (3) correcting conditions in which painted surfaces are rubbing, binding, or being crushed that can produce lead dust; (4) covering or restricting access to bare residential, lead contaminated soil; (5) conducting specialized cleaning upon completion of the above treatments; and (6) performing sufficient dust tests to ensure safety. \textit{Id.} at 77 (Exhibit 3–6).

\textsuperscript{173} \textit{Id.} at 88.

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{Id.} at 90.

\textsuperscript{176} \textit{TASK FORCE REPORT}, \textit{supra} note 3, at 88.

\textsuperscript{177} \textit{Id.} at 89.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.}
HUD and the EPA should implement regulations prohibiting the use of unsafe practices during testing and abatement activities. 181

Included in the Task Force report are the dissenting views of four members comprised of representatives of tenants or families at risk of lead poisoning and one environmental health scientist. 182 The dissenters reject the report’s central recommendations on standards and liability. 183 Specifically, the group repudiates three of the Task Force’s proposals on hazard reduction by arguing the following:

1. The report promotes partial, “interim controls” as the proper method to reduce lead-based paint hazards and a substitute for hazard abatement.
2. The report seeks to trade such partial, interim controls for protection from liability.
3. By leaving lead-based paint in children’s homes, the report places substantial burden for lead poisoning prevention on tenant children and their families, the persons least able to control their situation. 184

The dissenters conclude by recommending an alternative approach to lead-based paint poisoning prevention. 185 Similar to the Massachusetts regulatory model, the dissenters place an affirmative duty on the private property owner to test for and correct immediately lead-based painted interior surfaces. 186 Correction measures include abatement or making the paint intact where the paint is deteriorated, correcting deteriorated underlying surfaces, and abatement of surfaces that are chewable, subject to friction, or subject to impact. 187 In addition, the recommended scheme requires abatement be performed by trained and certified workers and subjects the owner to liability for noncompliance. 188

181 TASK FORCE REPORT, supra note 3, at 89.
182 Id. at 200.
183 Id.
184 Id.
185 Id. at 202–04 (dissenting views).
186 See TASK FORCE REPORT, supra note 3, at 203.
187 Id. at 203–04. A criticism of the dissenting views is that the recommended correction measures do not mandate abatement of all lead-based paint from the dwelling. Instead, the recommendations allow owners to correct lead-based paint surfaces by leaving deteriorated paint intact and by abating only chewable, friction, and impact surfaces. Id. at 203. A more expansive provision calling for abatement of all lead-based paint on interior surfaces, including intact paint on non-chewable, non-friction and non-impact surfaces, may be more appropriate. See supra note 154 and accompanying text. Mandating abatement of intact lead-based paint is consistent with the dissenters’ inclusion of intact lead-based paint into the recommended mandatory inspection provision. See TASK FORCE REPORT, supra note 3, at 203.
188 See TASK FORCE REPORT, supra note 3, at 204.
VI. RECOMMENDATIONS

Title X represents a newfound federal commitment towards the prevention of lead poisoning in children. Even with this commitment, however, Title X contains gaps in its implementation strategies that compromise its potential success in the identification, disclosure, and abatement of lead hazards. Under Title X, the federal government and its agencies "assume a management role in lead regulation,"\(^{189}\) leaving to the states the task of implementing prevention programs.\(^{190}\) Currently, half the states do not have lead paint laws, and some only have indulgent regulatory programs that merely prohibit the use of lead-based paint.\(^{191}\)

Many experts on lead poisoning prevention agree that the federal government should take a more active role in regulating testing and lead abatement activities.\(^{192}\) The Residential Lead Paint Hazard Abatement Act is a step towards this role. The Task Force established by Title X recognizes that federal leadership is an essential element of a nationwide acceptance of its recommended benchmark lead-based paint maintenance and control standards.\(^{193}\) Ironically, however, the Task Force's plea to federal agencies to endorse the benchmark standards may mislead state and local governments into a belief that such standards will, in fact, eradicate lead poisoning.

One of the most important roles of the Task Force was to fill the "critical gap in the current lead hazard control scheme—the lack of broadly recognized standards to guide owners and other parties in their choice and application of effective and efficient lead-based paint maintenance and hazard control interventions."\(^{194}\) The Task Force responded by presenting recommendations to state and local legislatures, property owners, insurers, and lenders on the important issues of testing and abatement. These recommendations fall short of offering an adequate means for an expeditious solution. In addition, even if amended, the Task Force report is not law. Under the current regulatory scheme, lead-based paint programs defer to state and local legislatures, who may or may not choose to implement more compre-

\(^{189}\) Tiller, supra note 33, at 267.
\(^{190}\) See 15 U.S.C. § 2684 (Supp. 1995). The Act does require the Administrator to promulgate a model state program which "may be adopted by any State." Id. § 2684(d).
\(^{191}\) See supra notes 33 and 37 and accompanying text.
\(^{192}\) See, e.g., 1991 Hearings, supra note 31, at 238 (testimony of David E. Jacobs); Task Force Report, supra note 3, at 88; Schukoske, supra note 32, at 560.
\(^{193}\) See supra note 177 and accompanying text.
\(^{194}\) Task Force Report, supra note 3, at 60.
hensive measures of hazard reduction. In the meantime, property owners are left with few incentives to remove lead-based paint hazards from their premises. Federal lawmakers should incorporate the recommendations in the following sections into future legislation.

A. Mandatory Testing for All Pre-1978 Private Housing

Hazard disclosure is an essential step in lead poisoning prevention. In order to embrace completely a housing approach to lead poisoning prevention, the law needs to create financial and legal incentives for property owners to discover and reveal lead hazards. Under the regulations proposed by HUD and the EPA, private property owners must disclose all known hazards to tenants and sellers. Although disclosure is a step in the right direction, HUD and the EPA's proposed regulations are silent on one of the most important steps to lead poisoning prevention—testing. The proposed regulations do not require that the seller or lessor of housing test for lead-based paint, even if such housing was constructed prior to 1978 and children under six reside in the housing.

Ironically, one possible effect of limiting disclosure to “information known to the seller or lessor” is to discourage property owners from testing their premises for lead-based paint and lead-based paint hazards. Property owners, fearing that discovery of lead hazards will reduce the potential purchase or rental price of a dwelling, would rather simply disclose the “Lead Warning Statement” and remain ignorant than risk financial loss. The present law supports their

195 See id. at 200 (recognizing this “era of decentralization, when lead-based paint programs will be consolidated with other programs and deferred to the states”) (dissenting views).
196 Id.
197 See supra text accompanying note 163.
198 See supra text accompanying note 164.
199 See supra note 159 and accompanying text.
200 See supra text accompanying note 29.
201 See Title X, supra note 1, §§ 4851-56; Proposed Requirements, supra note 2, at 54,984-55,003.
202 Proposed Requirements, supra note 2, at 54,988.
203 The regulations would not have this effect in the five states that currently require testing of homes where children under six reside or are expected to reside. See supra text accompanying note 34.
204 Matthew L. Wald, Lead Paint: New Rules, Old Questions, N.Y. TIMES, Feb. 12, 1994, § 9, at 1. Critics of the proposed regulations compare the disclosure rules to the government-mandated warnings on cigarette packages. These critics suggest that property owners, like many tobacco companies, will use the warnings to argue that consumers, i.e., residents, assume all risks when adequately warned. Id.
decision by possibly shielding them from liability once a buyer or tenant is warned adequately.\textsuperscript{205} Moreover, if injury from lead-based paint occurs, a buyer still must prove the seller's actual awareness of lead hazards on the particular property.\textsuperscript{206} Therefore, the burden to test for lead-based paint will remain most often on the buyer or lessee.\textsuperscript{207} This problem is particularly prevalent in low-income housing, where lead poisoning is most widespread and where tenants may not be in a position to shop around for lead-tested housing.\textsuperscript{208}

Mandatory testing of all pre-1978 housing is also absent from the EPA's and HUD's benchmark standards found in the 1995 report by the Task Force. Owners of pre-1978 housing not characterized as higher priority have the option of hiring a certified inspector to conduct a lead-based paint inspection.\textsuperscript{209} While an inspection that documents that the property is lead-free may help an owner in securing insurance and in any legal actions arising from the identification of an EBL child, testing remains completely within the owner's discretion.\textsuperscript{210}

A few states require testing before a property owner can lease or sell a dwelling.\textsuperscript{211} In these states, property owners, presumed to be aware of the presence of lead-based paint in their property, are forced to take responsibility for the condition of the dwelling.\textsuperscript{212} Most states, however, are slow to implement regulatory schemes aimed at discovering actual lead-based paint hazards.\textsuperscript{213} In these states that lack mandated testing, disclosure and abatement laws remain futile.\textsuperscript{214}

The transaction process is the most logical place to disclose risks posed by the presence of lead-based paint.\textsuperscript{215} Disclosure encourages potential occupants to make informed decisions when considering

\textsuperscript{205} Id.
\textsuperscript{206} See Underwood v. Risman, 605 N.E.2d 832, 835 (Mass. 1993) (holding seller has no duty to disclose lead paint to purchaser because purchaser failed to prove that seller actually knew of lead paint on property, in spite of seller's experience in real estate and his awareness of lead hazards).
\textsuperscript{207} See id.
\textsuperscript{208} See supra note 11.
\textsuperscript{209} See supra section V.C.
\textsuperscript{210} Id.
\textsuperscript{212} See id.
\textsuperscript{213} See supra note 34 and accompanying text.
\textsuperscript{214} See Mahoney, supra note 30, at 69–70 (citing McDonough, WHA Finally Got Lead Out, Del. Law., Fall 1986, at 49 (stating that in Wilmington, Delaware, children continued to suffer from lead poisoning where the housing authority failed to inspect public housing)).
\textsuperscript{215} See supra note 164 and accompanying text. Federal law currently requires sellers and lessors to test for other infirmities, such as termites and urea formaldehyde foam insulation, before selling or leasing a dwelling. Wald, supra note 204, at 1.
leasing or purchasing housing and to take greater precautions against exposure of lead-based paint. The federal government should ensure that tenants and home buyers in all states are at least aware of the presence of lead-based paint before occupancy.

Critics of mandatory testing at the point-of-transfer cite the potential impact on the affordability of housing and the inefficiencies of testing only dwellings undergoing a change of occupancy. These arguments, however, both exaggerate the costs of testing and ignore the futility of requiring disclosure without incentives to test for lead-based paint hazards. The administrative burdens such a rule creates are outweighed by the importance of identifying lead-based paint hazards in our nation's housing stock.

Congress should amend The Residential Lead-Based Paint Hazard Reduction Act to require the EPA and HUD to enact regulations requiring testing by lessors and sellers of target housing where children under the age of six reside or are expected to reside. The amended Act should require the sellers or lessors of target housing to test premises through licensed lead inspectors. The closing of a sale or rental would be contingent on obtaining an inspection report. Alternatively, the Task Force should amend its recommendations to require testing of all pre-1978 housing.

B. Required Abatement

Title X contains no specific provision for abatement of lead-based paint in private housing. In fact, the Task Force report promotes partial, "interim controls" over hazard abatement as an adequate method to achieve lead poisoning prevention. Federal agencies, such as HUD and the EPA, should reject explicitly the portion of the Task

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216 See Proposed Requirements, supra note 2 at 54,989 (discussing benefits of requiring disclosure of lead hazards during real estate transactions).

217 See text accompanying note 163.

218 1991 Hearings, supra note 31, at 78--82 (statement of Nat'l Assoc. of Realtors) (arguing for mandatory seller disclosure but against mandatory testing at point of transfer); see id. at 207 (statement of Nat'l Assoc. of Home Builders) (opposing mandatory inspection at point-of-transfer).

219 See supra section III.A.

220 See supra note 153.


222 See Title X, supra note 1, §§ 4851–56; Proposed Requirements, supra note 2, at 54,984–55,003.

223 See supra text accompanying notes 170 & 184.
Force's benchmark standards promoting interim control measures as a means to hazard reduction. These agencies should endorse the dissenting recommendations listed in the Task Force report, mandating testing and abatement of all pre-1980 dwellings occupied by children age six or under or by pregnant women.224

The Task Force defends its adoption of interim controls as the proper method of hazard reduction by relying on cost efficiency and the Task Force's perceived notion that abatement is economically infeasible.225 Studies show, however, that the societal benefits of preventing lead poisoning in children justify large investments in abatement.226 In addition, the estimated costs of proper interim control measures ignore the necessary costs of continued evaluation and corrections in surface condition and thus often are underestimated.227 The dissenters of the Task Force report disagree with the report's acceptance of the infeasability of abatement, stating that:

> [a]batement contributes to the renovation, cures code violations and structural defects, lowers future maintenance and monitoring costs, and averts liability costs. Especially in the most deteriorated, lowest income housing that has the greatest hazards, permanent abatement is clearly the option that may prove the most cost-effective, even without weighing the overwhelming health and social benefits in the equation.228

The real estate community opposes mandatory lead abatement, arguing that such legislation would drastically drive up market prices for the first-time home buyer.229 However, economists suggest that mandatory lead abatement will not have an adverse effect on the housing market because abatement expenses are recoverable in the purchase price.230 Mandatory lead abatement regulations inevitably

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224 See supra notes 182–84 and accompanying text.
225 See TASK FORCE REPORT, supra note 3, at 43 ("Given limited resources available to address this public health problem, particularly in the short term, permanent controls (full abatement) are not a financially realistic option for many property owners.").
226 Id. at 200 (dissenting views) (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STRATEGIC PLAN FOR THE ELIMINATION OF CHILDHOOD LEAD POISONING, 1991; J. Schwartz, Societal Benefits of Reducing Lead Exposure, 66 ENVTL. RESEARCH 105 (1994)).
227 Id. at 201.
228 Id.
229 1991 Hearings, supra note 31, at 79–80 (statement of Nat'l Assoc. of Realtors) (opposing mandatory point-of-transfer abatement because cost of abatement split between buyer and seller would increase cost of dwelling by $3,850 to a first time buyer).
230 See supra text accompanying note 65.
will lead to an expanded lead abatement industry where competition will drive prices down. 231

State legislatures raise concerns that legislating lead abatement activities will subject public housing authorities and private property owners to massive tort liability.232 These concerns are based on the fear that lead abatement requirements will raise the “standard of care” in personal injury litigation.233 Such concerns, however, ignore the fact that massive liability already exists under other legal theories. Even in states that do not grant tenants the right to sue for lead poisoning under public health statutes, property owners still may be liable on common law and statutory theories, such as warranty of habitability, contract theories, and state consumer protection statutes.234 As one commentator has noted, “the question is not whether there will be liability in the future . . . if legislation is enacted but how to limit the broad scope of liability that already confronts private and public landlords.”235

Fear of massive liability provides the utmost incentive for property owners to supply lead-free housing. This incentive breaks down, however, when property owners are unsure of what duty of care they owe their tenants.236 The enactment of legislation simultaneously can define and limit property owners’ duty of care.237 As courts apply a uniform standard of care requiring all property owners to provide lead-free housing, property owners will become more confident in their ability to avoid tort litigation and therefore more motivated to comply with the stricter regulatory scheme.238 Moreover, insurance companies are more likely to provide coverage for injuries stemming from lead-based paint in a jurisdiction with clear rules of liability.239

231 See supra note 115 and accompanying text (noting such an effect in Massachusetts).
233 Id.
236 To succeed on a negligence theory, the plaintiff must prove that 1) the defendant owed the plaintiff a duty of care; 2) the defendant breached that duty of care; 3) the plaintiff suffered an injury as a result of that breach. RESTATEMENT (SECOND) OF TORTS § 328A (1976).
237 See supra notes 70–73 and accompanying text.
238 1991 Hearings, supra note 31, at 254 (written testimony of Stephanie Pollack). This argument assumes that property owners will comply with the legal requirements.
239 See id.
240 See id.
In Massachusetts, a point-of-transfer disclosure provision successfully assures that property owners are notified of their duty to abate lead hazards. Without provisions mandating lead abatement, or at least providing owners with significant financial and legal incentives to conduct lead abatement, however, Title X's strategic plan to eliminate lead hazards, remains only that—a plan. By mandating lead abatement, the federal government could ensure that low-income housing is not passed from one investor to another, who in some states have little incentive to abate the lead in their dwellings.

Despite strict regulations mandating lead abatement, abatement will not occur throughout low-income communities without financial assistance. The federal government should offer federal income tax credits for the cost of lead abatement. The credits only should be given to taxpayers who have documentation of a safe and successful abatement. Congress also should consider levying a federal documentary stamp tax to be collected during property closings.

C. Incorporate Stringent, Benchmark Standards Into Model State Plan

Eventually, the EPA's and HUD's proposed regulations requiring disclosure of the risks and the presence of lead-based paint hazards "may affect rental and home buying choices and lead to gradual cleanup of the nation's housing stock." The change from health to housing approach in statutory schemes, however, has been too subtle. Today, the dangers of even low levels of lead exposure are well known.

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242 See Dolbeare statement, supra note 11, at 5 (discussing the need for programs, policies, and resources to implement the Health & Human Service's 1991 Strategic Plan).
243 1991 Hearings, supra note 31, at 251 (written testimony of Stephanie Pollack). "In Boston, for example, the owners of dwellings housing nearly 20% of the children found to be poisoned during the previous year are not abating—despite court orders—because they cannot afford abatement and judges realize that they cannot get blood from a stone." Id.
244 See Task Force Report, supra note 3, at 107 (recommending a federal income tax credit of the cost of lead-based paint hazards or $1,500, whichever is less).
245 Id.
246 This tax was advocated by David E. Jacobs. 1991 Hearings, supra note 31, at 237. One county in California levied a $10 tax on each house per year. Other common suggestions include an import tax on lead or an excise tax on lead manufacturers. Id. at 242.
247 See supra text accompanying note 164.
248 See supra notes 31–37 and accompanying text.
249 See supra section II.A.
Legislatures need to respond to this knowledge by taking a more aggressive step towards lead poisoning prevention.

The importance of regulatory mandates that both encourage and ensure accurate testing and safe abatement of lead-based paint in private housing necessitates a nationwide response through both state and federal legislation. Without regulatory mandates, efforts at providing resources and funds for lead abatement activities are futile. Massachusetts serves as an example of a successful lead poisoning prevention regulatory program. Specifically, the Massachusetts statute, through financial and legal incentives such as tax credits and threats of punitive damages, provides a self-enforcing scheme in which compliance is in the property owner's best interest. Despite these recognized successes, however, many states still have not enacted comprehensive regulatory schemes for lead-based paint testing and abatement, in part because of concerns regarding funding, safety, and liability.

Responding to these concerns, the Task Force developed benchmark national standards for maintenance and lead hazard control in private housing. As recognized by the Task Force “[b]enchmark standards provide the basis for more uniform, protective, and cost-effective state and local laws and regulations related to lead-based paint hazard control and help owners understand the steps they need to take to protect occupants from lead hazards in housing.” As discussed above, however, the benchmark standards on hazard reduction do not adequately advance Congress's expressed goal of obtaining an expeditious solution to childhood lead poisoning. Recognizing this, representatives of tenants, families at risk, and an environmental health scientist proposed more stringent mandates for property owners of dwellings containing lead-based paint hazards. The standards suggest specific and comprehensive regulations for states in all areas of lead hazard control, including risk assessment, education, infrastructure development, and safe lead abatement procedures.

Federal endorsement of these more stringent standards is critical in facilitating the adoption of these standards by state and local leg-

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250 See supra notes 133–34 and accompanying text.
251 See supra text accompanying notes 93–96.
252 See supra section IV.
253 See supra text accompanying notes 52–55.
254 TASK FORCE REPORT, supra note 3, at 60.
255 See supra text accompanying notes 182–88.
256 Id.
The federal government’s position as grant provider gives it the necessary leverage to encourage state and local legislatures to enact comprehensive and effective lead-based paint regulations. As the public becomes more aware of the hazards of lead-based paint, the public puts more pressure on its local legislatures to require risk assessment and hazard removal in private housing. State legislatures have responded by looking to the federal government for financial support to conduct sufficient lead-based paint hazard reduction activities. The federal grant program not only can provide funds for these state and local governments, but more importantly it can provide incentives for developing organized and cost-effective plans to fight lead poisoning. The federal government, through its grant program, should take a more active role in requiring inspections, testing, and abatement of lead-based paint hazards in priority housing.

Specifically, Congress should incorporate the Task Force benchmark standards, amended to include the dissenters’ recommendations on testing and abatement, as its Model State Plan, identified in § 4852 of the Residential Lead-Based Paint Hazard Reduction Act. To provide incentives for states to follow the model, financial assistance, in the form of priority grants under the federal grant program, should be given to those states that adopt the Model Plan. This would provide the states with more guidance in determining funding and safe lead abatement techniques and would more clearly define the criteria for obtaining grants.

Eventually, nationwide adoption of the Model Plan would ensure that citizens from all states are able to reside in lead-free housing. The tightening of federal grant money to give priority to those states who adopt the Model Plan would reinforce the importance of lead

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257 C.f. TASK FORCE REPORT, supra note 3, at 88 (advocating for federal endorsement of the report’s benchmark standards).

258 See supra notes 83–92 and accompanying text. The federal government often uses its grant programs to influence state and city legislatures. For example, discretionary federal grants in highway funds are given only to states that maintain the maximum speed limit within urbanized areas of a population of 50,000 or more at 55 miles per hour. 23 U.S.C. § 154 (1986). In addition, the federal government withholds highway funds from states that maintain a drinking age of less than 21 years of age. Id.


260 Id.

261 See Schukoske, supra note 32, at 548 (stating that “it appears inefficient to leave these complicated determinations regarding health and abatement procedures to state and local governments”); No Testing, Just a Pamphlet, supra note 259 (“It would appear the federal government has decided to toss the problem of lead paint to local governments.”).

262 Title X, supra note 1, § 4852.

263 See supra text accompanying notes 93–96.
poisoning prevention and the need to establish a regulatory scheme to encourage testing and lead abatement in private housing.\textsuperscript{264} Moreover, the grant program would serve as a financial incentive for states to adopt the benchmark standards into their own regulatory schemes.\textsuperscript{265}

\textbf{VII. Conclusion}

Despite two decades of research, strategy, and regulations at both federal and state levels, lead poisoning, a preventable disease, remains one of the most serious environmental health problems in the United States today. Lead poisoning is completely preventable by removing lead-based paint from a dwelling before a child becomes ill. Eliminating lead-based paint from our nation’s housing stock, however, is both difficult and expensive. Comprehensive regulatory programs that encourage property owners to test for and abate lead-based paint hazards are critical to any successful prevention program.

Although Congress explicitly has embraced a national goal of eliminating lead-based paint from housing as expeditiously as possible, the federal government leaves to the states the task of implementing many of the necessary components to achieve this goal. Massachusetts has met this challenge with a stringent regulatory scheme that leaves property owners with little choice but to provide lead-free housing. Most states, however, resist enacting comprehensive regulatory schemes for lead-based paint removal, in part because of fundamental questions on how to fund lead abatement and how to ensure safe lead abatement in private housing.

The federal government and its agencies are potentially in the best position to ensure that state legislatures enact, and property owners follow, proper testing and safe lead abatement techniques. Using Massachusetts as a model, the federal government should assume a more active role in regulating nationwide lead poisoning prevention programs so that this preventable disease will be cured “as expeditiously as possible.”\textsuperscript{266}

\textsuperscript{264} See \textsc{Task Force Report, supra} note 3, at 88 (recognizing that model housing codes encourage state adoption of benchmark standards and reinforce the importance of comprehensive regulatory schemes).

\textsuperscript{265} See \textit{id. at 106} (recommending an extension of HUD Block Grant Programs conditioned on adherence to benchmark standards as a means of promoting lead-based hazard control).

\textsuperscript{266} Title X, \textit{supra} note 1, § 4851.