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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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¹ The Residential Lead-Based Paint Act of 1992, 42 U.S.C. §§ 4851-56 (Supp. IV 1992) (current version at 42 U.S.C.A. §§ 4851-56 (1995)) [hereinafter Title X]. The Residential Lead-Based Paint Hazard Reduction Act is Title X of the Housing and Community and Development Act of 1992, Public Law 102-550 and therefore is commonly referred to as Title X.

² Proposed Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, 59 Fed. Reg. 54,984 (1994) (to be codified at 24 C.F.R. pt. 38 & 40 C.F.R. pt. 745) (proposed Nov. 2, 1994) [hereinafter Proposed Requirements]. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act) directs the EPA and HUD to jointly issue regulations requiring disclosure of certain information by persons selling or leasing housing that may contain lead-based paint or lead-based paint hazards. 42 U.S.C. § 4852(d). The final regulations were targeted to go into effect on October 28, 1995. Federal officials say a more realistic date is late 1996 or early 1997.

³ LEAD-BASED PAINT HAZARD REDUCTION AND FINANCING TASK FORCE, REPORT, PUTTING THE PIECES TOGETHER: CONTROLLING LEAD HAZARDS IN THE NATION'S HOUSING 36 (1995) [hereinafter TASK FORCE REPORT].

⁴ 42 U.S.C. §§ 4851-56.

reduce the hazards in their own dwellings.⁵ 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.⁶ 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."⁷ Approximately 57 million homes in the United States contain lead-based paint on interior or exterior surfaces.⁸ Deteriorating lead-based paint

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.⁹ In these homes, lead poisoning afflicts three million children under the age of six.¹⁰ Although lead poisoning disproportionately affects minority and low-income children, "the disease does not respect geography or social station."¹¹ 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.¹²

A. *Effects of Lead Poisoning*

The health effects of lead poisoning vary according to the level of exposure.¹³ 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.¹⁴ 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.¹⁵ Higher levels of lead exposure can cause blindness, brain damage, kidney disease, convulsions,

PREHENSIVE AND WORKABLE PLAN FOR THE ABATEMENT OF LEAD-BASED PAINT IN PRIVATELY OWNED HOUSING: REPORT TO CONGRESS 5-16 (Dec. 7, 1990) [hereinafter HUD PLAN].

⁹ *Id.* Lead-contaminated dust most often comes from deteriorating lead-based paint.

¹⁰ TASK FORCE REPORT, *supra* note 3, at 36.

¹¹ Philip J. Landrigan & Andrew C. Todd, *Lead Poisoning*, 161 W.J. MED. 153, 153 (Aug. 1994). Of 3.8 million private homes with young children and priority hazards, approximately 1.8 million are occupied by families with incomes over \$30,000 and 2 million are occupied by families with incomes below the median. *Lead-Based Paint in Housing and HUD's Response: Hearings Before the Subcomm. on Employment and Housing of the House Gov't Operations Comm.*, 102d Cong., 1st Sess. 61 (Apr. 29, 1991) (testimony of John C. Weicher, Assist. Secretary for Pol. Dev. & Res., HUD [hereinafter Weicher testimony]). Moreover, "even for the lowest risk group, white children outside central cities, the prevalence rate is nine percent, which eclipses all other preventable pediatric diseases and all other environmental health hazards." *Id.* at 24 (statement of Cushing N. Dolbeare, ALLIANCE TO END CHILDHOOD LEAD POISONING) [hereinafter Dolbeare statement].

¹² *Lead Poisoning Still a Major Threat to American Children According to Physician Group*, Bus. Wire, Dec. 7, 1994. The blood-lead threshold defining childhood lead poisoning is 10 g/dl. Dolbeare statement, *supra* note 11, at 23.

¹³ See PREVENTING LEAD POISONING, *supra* note 6, at 9.

¹⁴ *Id.* The recognition that low-dose exposure to lead, or subclinical toxicity, can cause harmful effects is relatively recent. This recognition has resulted in the lowering of the blood-lead threshold defining childhood lead poisoning by the CDC from 25 micrograms per deciliter (g/dl) to 10 g/dl. See *id.* at 7.

¹⁵ See *id.* Lead poisoning is often referred to as "the silent disease" because its adverse health effects occur gradually and imperceptibly. Landrigan & Todd, *supra* note 11, at 155 (noting that such "subclinical changes represent truly harmful outcomes, not merely homeostatic or physiologic adjustments to the presence of lead").

cancer, and even death.¹⁶ In addition, lead exposure before or during pregnancy can affect fetal development and cause miscarriages.¹⁷

Children under the age of six are the most vulnerable to lead poisoning.¹⁸ Children absorb lead both by ingesting paint chips¹⁹ and by breathing in lead-contaminated house dust.²⁰ 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.²¹

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.²² 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."²³

B. *Testing: A Critical, Yet Unnoticed Step in the Prevention of Lead Poisoning*

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

¹⁶ See Herbert L. Needleman et al., *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood: An 11-Year Follow-Up Report*, 322 NEW ENG. J. MED. 83, 85-88 (Jan. 11, 1990). High level of exposure to lead is called acute symptomatic poisoning. Landrigan & Todd, *supra* note 11, at 155.

¹⁷ 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).

¹⁸ 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).

¹⁹ PREVENTING LEAD POISONING, *supra* note 6, at 18. Children often ingest paint chips from banisters, window sills, doors, and fallen chips on the floor. *Id.* at 19.

²⁰ *Id.* The most common source of lead poisoning in children is inadvertent ingestion of contaminated house dust. *Id.* However, because dust most often is caused by deteriorating lead-based paint, lead-based paint and lead dust will be treated as equivalent in this Comment. Other less common sources of lead poisoning include drinking water, parental occupations and hobbies, air, food, and many "non-Western" medicines and cosmetics. *Id.* at 17-25.

²¹ 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)).

²² PREVENTING LEAD POISONING, *supra* note 6, at 1.

²³ 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.

³⁰ *See* Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 54 (1990); Michele Gilligan & Deborah A. Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 260, 267-68 (1987); Lead-Based Paint Hazard Elimination in Certain Residential Structures, Advance Notice of Proposed Rulemaking, 49 Fed. Reg. 19,210, 19,213 (1984) [hereinafter Advance Notice].

³¹ *See* Gilligan & Ford, *supra* note 30, at 244; *see also* 1992 *Hearings*, *supra* note 17, at 1 (opening statement of Senator Alan Cranston); *Lead-Based Paint Hazard in American Housing: Hearing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 1st Sess. 246-53 (1991) [hereinafter 1991 *Hearings*] (written testimony of Stephanie Pollack, Director of the Lead Poisoning Project, Conservation Law Foundation, Boston, MA).

³² *See* Jane Schukoske, *The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard*, 45 S.C. L. REV. 511, 525-26 (1994).

late the presence of lead-based paint in private housing.³³ Of those states, five required inspection of private housing before a child becomes ill³⁴ and six had statewide programs to test children for elevated blood lead levels.³⁵ Even in states with laws mandating testing, testing frequently is ignored.³⁶ Moreover, only two states require lead abatement of private housing where children under the age of six reside or are expected to reside.³⁷

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 combatting 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."³⁸

The health approach consists of using resources to test children for elevated blood lead levels, treating afflicted children, and subsequently abating the hazard.³⁹ The discovery of a poisoned child triggers action to avoid further injury to that child.⁴⁰ Viewed as the most cost effective strategy to testing and abatement,⁴¹ most state and local governments use the health approach.⁴² Recently, however, commentators have highly criticized this reactive approach for its focus on reducing

³³ Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Right Direction*, 18 HARV. ENVTL. L. REV. 265, 268 n.23 (1994) (listing 25 states with lead statutes).

³⁴ *Id.* at 268 n.25 (listing five states requiring inspection).

³⁵ *Id.* (listing six states with screening programs); see also Gilligan & Ford, *supra* note 30, at 249 n.90 (listing 10 states placing restrictions on methods of abatement as of 1987).

³⁶ See James Denn, *Lead Rule Will Weigh Heavily*, THE TIMES UNION, at B1 (Oct. 15, 1995).

³⁷ *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 197 (Supp. 1994). Other states merely prohibit the use of lead paint in housing. See, e.g., DEL. CODE ANN. tit. 31, § 4114(d) (1988).

³⁸ Advance Notice, *supra* note 30, at 19,213.

³⁹ *Id.* at 19,212-13, 19,223; Gilligan & Ford, *supra* note 30, at 260-61 & n.116.

⁴⁰ Mahoney, *supra* note 30, at 54.

⁴¹ Proponents of the health approach argue that it avoids the need to spend large amounts of money on abatement of housing where children are not injured by lead. See, e.g., *Lead-Based Paint Poisoning Prevention Act of 1975: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Pub. Welfare*, 94th Cong., 1st Sess. 45, 60-65 (1975) [hereinafter *1975 Hearings*] (statement of Claude E. Barfield, Deputy Assist. Secretary, HUD). The federal Lead Paint Poisoning Prevention Act adopted the health approach until 1987. 42 U.S.C. § 4852 (Supp. V 1987) (prior to 1988 amendment).

⁴² See Gilligan & Ford, *supra* note 30, at 270.

the consequences, rather than the source, of lead poisoning.⁴³ As stated by one commentator, the health approach uses children as “mine canaries” and “lead detectors.”⁴⁴ In addition, the health approach risks exposing pregnant women whose fetuses’ lead contents may not be detectable until irreparable injury occurs.⁴⁵

The housing approach, in contrast to the reactive health approach, focuses on the prevention of lead poisoning.⁴⁶ Under the housing approach, jurisdictions develop systematic programs to test housing for impermissible concentrations of lead.⁴⁷ Lead-based paint hazards in dwellings are abated regardless of the presence of a child or the condition of a child’s health.⁴⁸ Because abatement occurs before a child becomes ill, many commentators believe that the “housing approach” is the preferred public health approach⁴⁹ 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.⁵⁰

Despite the low costs⁵¹ and importance of testing in the prevention of lead poisoning, mandated testing is often absent from federal, state, and local regulations.⁵² As of 1994, only five states provided for testing of dwellings for the presence of lead before a child becomes ill.⁵³ One primary reason for the small number of comprehensive state lead

⁴³ See Mahoney, *supra* note 30, at 55 (“[I]t is difficult to see how a plan premised on the poisoning of children can ever be characterized as prevention.”).

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)).

⁴⁵ See Perkins, *supra* note 18, at 13.

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

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

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.

⁴⁹ Gilligan & Ford, *supra* note 30, at 261 n.116.

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

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 fluorescence (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.

⁵² See Tiller, *supra* note 33, at 268 n.25.

⁵³ *Id.*

paint laws is the state legislatures' "fear[] of liability in uncharted territory."⁵⁴ The most fundamental question facing state and local governments is how to fund lead abatement of private housing.⁵⁵

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

Federal law banned the use of lead-based paint in residential housing in 1978.⁵⁶ Despite this prospective ban, ascertaining who is responsible for the removal of lead-based paint hazards in private housing still remains difficult.⁵⁷ Property owners,⁵⁸ lead manufacturers,⁵⁹ and parents⁶⁰ of poisoned children all resist responsibility for harm ema-

⁵⁴ SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, NATIONAL AFFORDABLE HOUSING ACT AMENDMENTS OF 1992, S. REP. NO. 332, 102d Cong., 2d Sess. 107, 116 (July 23, 1992) [hereinafter SENATE REPORT].

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., Norword 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.

⁵⁹ See, e.g., Santiago v. N.L. Indus., No. 87-2799-T (D. Mass. filed Nov. 17, 1987); Leblanc v. Sherwin-Williams Co., No. 8635232 (Mass. Super. Ct., Worcester County filed Aug. 15, 1986); see also Michael Pare, *In R.I., Lead Poisoning Ranks as a 'Severe' Health Problem*, PROV. BUS. NEWS, Aug. 29, 1994, § 1, at 8 (discussing lead manufacturers' reaction to the 45 cent lead tax proposed by Finance Committee of U.S. Senate).

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.⁶¹ While courts struggle to find culpability among innocent parties,⁶² 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.⁶³

Property owners are the primary group responsible for financing the abatement of lead-based paint hazards in private housing.⁶⁴ 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.⁶⁵ 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.⁶⁶

Property owners argue that they should not have to pay the high costs of abating lead-based paint⁶⁷ which may have been applied to housing years before they purchased it.⁶⁸ Although some states attempt to minimize costs through tax credits and deductions,⁶⁹ property owners still incur the majority of lead abatement costs. In addition, owners are frustrated with the lack of uniformity in lead abatement standards.⁷⁰ For example, in 1971, Massachusetts required owners of target housing to remove intact paint from doors, door frames, and

A Response to the Lead Paint Manufacturer's Attempt to Limit their Liability by Seeking Abrogation of Parental Immunity, 18 B.C. ENVTL. AFF. L. REV. 381, *passim* (1990).

⁶¹ Schukoske, *supra* note 32, at 522-24.

⁶² 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.

⁶³ See, e.g., MASS. GEN. LAWS ch. 111, § 194.

⁶⁴ See, e.g., *id.* 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.*

⁶⁵ Gilligan & Ford, *supra* note 30, at 287-90.

⁶⁶ See *id.* at 290.

⁶⁷ 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.

⁶⁸ See *supra* note 58.

⁶⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 62 § 6(e) (Supp. 1995).

⁷⁰ See Purdy, *supra* note 58, at B1. Harold M. Shultz, Deputy Commissioner for Housing Preservation in New York City was reported as saying, "[t]here'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.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.⁷² Soon an owner will be allowed to contain lead paint with an encapsulate, a much easier and cheaper form of lead abatement.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.⁷⁴

Some commentators argue that manufacturers of lead-based products, not property owners, should help pay for lead abatement.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.⁷⁶ Money raised from the tax would be targeted toward removing hazardous lead-based paint from inner-city houses nationwide.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-

⁷¹ MASS. GEN. LAWS ANN. ch. 111, § 197A (1971).

⁷² MASS. GEN. LAWS ANN. ch. 111, § 197A (1987).

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)).

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.*

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).

⁷⁶ See Pare, *supra* note 59, at 8.

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.⁷⁸ In addition, manufacturers argue that lead is a critical element needed for such useful activities as medical research and treatment⁷⁹ 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.⁸⁰ Although the use of lead-based paint for internal residential use was banned in 1978,⁸¹ at present, lead-based paint may be used on exterior surfaces of housing and for steel structures.⁸²

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.⁸³ In response to this high cost, Congress expanded its federal grant program to encourage property owners to undergo lead abatement in private housing.⁸⁴ 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 housing⁸⁵ that is not federally assisted, federally owned, or public.⁸⁶

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).

⁸¹ Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303.1-5.

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.⁸⁷ 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.⁸⁸ The Act also requires that the grant only be used for risk assessment, lead abatement, and educational activities.⁸⁹

The \$500 million grant program has the effect of making the federal government an "integral part" of state and local housing strategies.⁹⁰ 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.⁹¹ In theory, the program ensures the effectiveness of the recipients' activities.⁹²

In practice, however, many states that receive federal grants do not have effective programs for reducing lead-based paint hazards in their jurisdictions.⁹³ 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.⁹⁴ Thus, states and local governments alone are left to decide how to test and abate safely and cost-effectively.⁹⁵ 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.⁹⁶ The result in most states is inefficient and

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.⁹⁷ Since Massachusetts passed the first state statute aimed at removing lead-based paint in 1971,⁹⁸ Massachusetts has continued to incorporate an aggressive "housing approach" in its regulations.⁹⁹ 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.¹⁰⁰ Moreover, the Massachusetts Act requires removal of lead-based paint before a child becomes ill.¹⁰¹ The Massachusetts Act's effectiveness¹⁰² stems from this unique focus on both the treatment and the prevention of lead poisoning.¹⁰³

The Massachusetts Act places the duty and financial burden of lead abatement on the property owner. Under the Massachusetts Act, the property owner¹⁰⁴ 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.¹⁰⁵ In addition, the property owner is responsible for the cost of relocating a tenant during lead abatement and for that portion of

⁹⁷ See Tiller, *supra* note 33, at 267.

⁹⁸ The Lead Paint Poisoning Prevention Act, MASS. GEN. LAWS ANN. ch. 111, §§ 190-99 (1971).

⁹⁹ See *id.* (1983 & Supp. 1994).

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.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.¹⁰⁷ Property owners also may apply for loans to help with lead abatement and containment expenses.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.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.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.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.¹¹² The Massachusetts Act requires that only licensed contractors or those who have completed an approved instruction course perform lead abatement activities.¹¹³ The Massachusetts Act also requires that occupants be removed from premises undergoing dangerous deleading activities.¹¹⁴ These regulatory mandates have resulted in an expanded in-

¹⁰⁶ *Id.*

¹⁰⁷ 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).

¹⁰⁸ 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." *Id.* Funds are distributed through community action agencies, redevelopment agencies, local non profit communities, and housing agencies and other appropriate organizations. *Id.* Under the direction of the statute, Massachusetts has established a comprehensive abatement loan program. See MASS. REG. CODE tit. 751, § 12.00 et seq. (July 14, 1994).

¹⁰⁹ MASS. GEN. LAWS ANN. ch. 111, §§ 197(b), (c).

¹¹⁰ *Id.* § 197(a). The encapsulant covers the lead paint preventing lead contamination.

¹¹¹ 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.

¹¹² MASS. GEN. LAWS ANN. ch. 111, § 197.

¹¹³ *Id.* § 197(d).

¹¹⁴ *Id.* §§ 197(g), (h). Occupants only may remain if the director or local board of health finds

frastructure of licensed inspectors and contractors that has reduced the cost of testing and abating private housing in Massachusetts.¹¹⁵ Even if a child under the age of six does not reside or is not expected to reside at a premises built before 1978, under Massachusetts law the landlord must inform renters that the premises may contain lead paint.¹¹⁶ The law requires landlords and renters to sign a disclosure form, discussing the hazards of lead paint.¹¹⁷

The Massachusetts Act also includes legal incentives to owners to comply with the lead abatement laws and safety procedures. A property owner who receives a letter of full compliance indicating that a premises meets all statutory requirements cannot be held strictly liable for injury or damages caused by lead poisoning, nor can that property owner be liable under the state sanitary code.¹¹⁸ This exemption from strict liability is meant to increase compliance with the lead paint laws "and thereby reduce lead poisoning."¹¹⁹ The Massachusetts Act ensures safe compliance by maintaining that "the owner shall remain subject to a standard of reasonable care relative to compliance" with the provisions of the statute.¹²⁰ The Massachusetts Act also contains affirmative sanctions imposing punitive damages of three times actual damages on property owners who fail to remove lead-based paint hazards after official notification.¹²¹ The Massachusetts Act effectively encourages owners who cannot afford to abate a lead-contaminated dwelling immediately to begin interim control measures by shielding those owners from strict liability for damages caused by lead exposure during the period of interim control.¹²²

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.¹²³ At the same time, loans and tax advantages give property owners the economic means to delead safely, thereby encouraging investment in private housing.¹²⁴ 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)."¹²⁵ 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,¹²⁶ abatement of lead hazards remains a necessary step in the prevention of lead poisoning.¹²⁷ Both the housing approach and the health approach require eventual abatement.¹²⁸ Medical research confirms the necessity of abating lead-based paint from housing as an essential part of treating and preventing the disease.¹²⁹ Depending on the method used,¹³⁰ however, abatement can be both expen-

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.

¹²⁹ See, e.g., 1992 *Hearings*, *supra* note 17, at 119–23 (testimony of Dr. Ellen K. Silbergeld); *Environmental Toxins and Children: Exploring the Risks, Pt. II: Hearing before the Select Comm. on Children, Youth, and Families*, 101st Cong., 2d Sess. 46, 47 (1990) [hereinafter 1990 *Hearings*] (testimony of Dr. Herbert L. Needleman, Prof. of Psychiatry and Pediatrics, U. of Pittsburgh, School of Med.).

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.*

sive¹³¹ and dangerous.¹³² Regulations are therefore critical for both ensuring safe abatement and for providing funding to private owners.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.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.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."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.¹³⁷ In the Act and its subsequent amendments,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

¹³¹ Estimated costs of abatement range from \$3,000 to \$10,000 per dwelling, depending on the method of abatement and the severity of the hazard. See 1991 Hearings, *supra* note 31, at 110-11. In 1987, however, Congress reported that the social cost of childhood lead poisoning exceeded the cost of abatement. H.R. CONF. REP. NO. 426, 100th Cong., 1st Sess. 244 (1987), reprinted in 1987 U.S.C.C.A.N. 3541.

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.

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).

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.

¹³⁵ See 42 U.S.C. §§ 4851-56 (1994).

¹³⁶ See 42 U.S.C. § 4851 (Supp. IV 1992).

¹³⁷ 42 U.S.C. §§ 4801-46 (1971), amended by 42 U.S.C. §§ 4821-46 (1988).

¹³⁸ *Id.*

most effectively be removed.”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).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.¹⁴¹ Yet, because it lacks specific implementation procedures and financing mechanisms, the Plan failed to reduce significantly lead-based paint poisoning in private housing.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).¹⁴³ Title X represents an expanded federal commitment to the prevention of lead-based paint in private as well as public housing.¹⁴⁴ Under Title X, Congress explicitly adopts a housing approach that seeks to prevent, rather than simply to treat, lead poisoning.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.¹⁴⁶

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

¹³⁹ *Id.*

¹⁴⁰ HUD PLAN, *supra* note 8, at 5–16.

¹⁴¹ *Id.*

¹⁴² See 1992 Hearings, *supra* note 17, at 2 (opening statement of Senator Alan Cranston). “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.” *Id.*

HUD, following 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.

¹⁴³ 42 U.S.C. §§ 4851–56 (1994).

¹⁴⁴ See *id.*

¹⁴⁵ *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.” *Id.*

¹⁴⁶ 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.” *Id.* Title X instead calls for the development of “a

tual, not potential hazards.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.¹⁴⁸ Under this definition, intact lead-based paint on walls in a kitchen, bathroom, or child's bedroom does not constitute a hazard.¹⁴⁹ Congress reasoned that, although lead-based paint in such areas has the potential to become hazardous,¹⁵⁰ such paint poses no immediate health threat to children.¹⁵¹ Moreover, Congress believed that this narrower definition would reduce the cost of inspection and abatement to private owners.¹⁵² The price paid for such cost-efficiency, however, may prove to be increased and more costly health hazards.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.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, *supra* note 1, § 4851(a)(1).

¹⁴⁷ See TASK FORCE REPORT, *supra* note 3, at 39.

¹⁴⁸ Title X, *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." *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." *Id.* § 4851b(2). A "friction surface" is a "surface that is subject to abrasion or friction, including certain window, floor and stair surfaces." *Id.* § 4851b(10). An "impact surface" is an "interior or exterior surface that is subject to damage by repeated impacts." *Id.* § 4851b(11).

¹⁴⁹ See *id.* § 4851b.

¹⁵⁰ SENATE REPORT, *supra* note 54, at 112 (recognizing the danger if water damage caused paint to crack on an interior wall).

¹⁵¹ *Id.*

¹⁵² *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." *Id.*

¹⁵³ H.R. CONF. REP. NO. 426, 100th Cong., 1st Sess. 244 (1987), reprinted in 1987 U.S.C.C.A.N. 3541. "The health care costs to taxpayers and society in general are greater than the cost for removing this highly preventable health hazard of lead-poisoning of young children." *Id.*; see TASK FORCE REPORT, *supra* note 3, at 37-39 (listing the benefits of preventing childhood lead poisoning as lower medical costs, decreased special education costs, and improved productivity).

¹⁵⁴ PREVENTING LEAD POISONING, *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

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."¹⁶⁴

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).¹⁶⁵ In 1995, the Task Force issued a final report on its recommendations.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,¹⁶⁷ to undertake additional action when a child resident has an elevated blood lead level (EBL),¹⁶⁸ and to control identified lead-based paint hazards.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

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.

¹⁶⁵ 42 U.S.C. § 4852.

¹⁶⁶ See TASK FORCE REPORT, *supra* note 3, at 2-17.

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).

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).

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.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 hazards¹⁷¹ or regularly perform a set of “Standard Treatments.”¹⁷²

The Task Force’s recommended benchmark standards do not carry the force of law and are not self-executing.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.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.¹⁷⁵

Significantly, the Task Force calls for active participation by the federal government in facilitating the adoption of the benchmark standards.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.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.¹⁷⁸ HUD also should use the standards in its regulations for federally subsidized programs, requiring compliance with the standards for recipients of the programs.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.¹⁸⁰ Lastly,

¹⁷⁰ *Id.*

¹⁷¹ TASK FORCE REPORT, *supra* note 3, at 72.

¹⁷² *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. *Id.* at 77 (Exhibit 3–6).

¹⁷³ *Id.* at 88.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 90.

¹⁷⁶ TASK FORCE REPORT, *supra* note 3, at 88.

¹⁷⁷ *Id.* at 89.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *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.¹⁹⁵ In the meantime, property owners are left with few incentives to remove lead-based paint hazards from their premises.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ Under the regulations proposed by HUD and the EPA, private property owners must disclose all known hazards to tenants and sellers.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

Ironically, one possible effect of limiting disclosure to “information known to the seller or lessor”²⁰² is to discourage property owners from testing their premises for lead-based paint and lead-based paint hazards.²⁰³ 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.²⁰⁴ 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.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.²⁰⁶ Therefore, the burden to test for lead-based paint will remain most often on the buyer or lessee.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.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.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.²¹⁰

A few states require testing before a property owner can lease or sell a dwelling.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.²¹² Most states, however, are slow to implement regulatory schemes aimed at discovering actual lead-based paint hazards.²¹³ In these states that lack mandated testing, disclosure and abatement laws remain futile.²¹⁴

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

²⁰⁵ *Id.*

²⁰⁶ See *Underwood v. Risan*, 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).

²⁰⁷ See *id.*

²⁰⁸ See *supra* note 11.

²⁰⁹ See *supra* section V.C.

²¹⁰ *Id.*

²¹¹ See, e.g., MASS. GEN. LAWS ANN. ch. 111, § 197.

²¹² See *id.*

²¹³ See *supra* note 34 and accompanying text.

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)).

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.²¹⁶ 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.²¹⁷

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.²¹⁸ 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.²¹⁹ The administrative burdens such a rule creates are outweighed by the importance of identifying lead-based paint hazards in our nation's housing stock.²²⁰

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.²²¹ 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.²²² In fact, the Task Force report promotes partial, "interim controls" over hazard abatement as an adequate method to achieve lead poisoning prevention.²²³ Federal agencies, such as HUD and the EPA, should reject explicitly the portion of the Task

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.

²²¹ Mandatory testing of single and multi-family properties built before 1980 at point-of-transfer was proposed by Representative Henry Waxman in the House of Representatives in 1991. H.R. 2840, 102d Cong., 1st Sess. (1991).

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 infeasibility 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

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 care²³⁶ they owe their tenants.²³⁷ The enactment of legislation simultaneously can define and limit property owners' duty of care.²³⁸ 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.²³⁹ Moreover, insurance companies are more likely to provide coverage for injuries stemming from lead-based paint in a jurisdiction with clear rules of liability.²⁴⁰

²³¹ See *supra* note 115 and accompanying text (noting such an effect in Massachusetts).

²³² *Cf.* 1991 *Hearings*, *supra* note 31, at 252-53 (written testimony of Stephanie Pollack) (discussing and dismissing similar liability concerns regarding abatement at the federal level).

²³³ *Id.*

²³⁴ See, e.g., *Hardy v. Griffin*, 569 A.2d 49, 50-51 (Conn. Super. Ct. 1989) (holding property owner liable for child's lead paint poisoning under state consumer protection statute for renting unfit premises).

²³⁵ 1991 *Hearings*, *supra* note 31, at 253 (written testimony of Stephanie Pollack).

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.²⁴¹ 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.²⁴² 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.²⁴³ The federal government should offer federal income tax credits for the cost of lead abatement.²⁴⁴ The credits only should be given to taxpayers who have documentation of a safe and successful abatement.²⁴⁵ Congress also should consider levying a federal documentary stamp tax to be collected during property closings.²⁴⁶

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."²⁴⁷ The change from health to housing approach in statutory schemes, however, has been too subtle.²⁴⁸ Today, the dangers of even low levels of lead exposure are well known.²⁴⁹

²⁴¹ MASS. GEN. LAWS ANN. ch. 111, § 197A(b) (1996) (requiring that sellers and real estate agents disclose any known hazards and abatement requirement upon sale of residential property).

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.²⁵⁰ Without regulatory mandates, efforts at providing resources and funds for lead abatement activities are futile.²⁵¹ 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.²⁵² 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.²⁵³

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."²⁵⁴ 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.²⁵⁵ 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.²⁵⁶

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

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.*

islatures.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ State legislatures have responded by looking to the federal government for financial support to conduct sufficient lead-based paint hazard reduction activities.²⁶⁰ 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.²⁶¹ 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.²⁶² 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.²⁶³

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

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.*

²⁵⁹ See, e.g., *No Testing, Just a Pamphlet*, WASH. POST, Dec. 4, 1994.

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.²⁶⁴ Moreover, the grant program would serve as a financial incentive for states to adopt the benchmark standards into their own regulatory schemes.²⁶⁵

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."²⁶⁶

²⁶⁴ See 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).

²⁶⁵ See *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).

²⁶⁶ Title X, *supra* note 1, § 4851.