

ALERT

# Lead-ing into Uncertainty: EPA Signals a Confusing New Enforcement Strategy Against Property Management Companies Under the RRP Rule

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March 31, 2022

Effective March 21, 2022, the U.S. Environmental Protection Agency (EPA or the Agency) has withdrawn from its website two questions and the Agency's answers (FAQs) related to Property Management Companies' (PMC) obligations under the Lead Renovation, Repair and Painting Rule (RRP Rule or Rule).

EPA's intent to withdraw these FAQs was announced on November 4, 2021, when the Agency published in the Federal Register a Notice and solicited public comments.

Much like lead-based paint, the problems for PMCs caused by the withdrawal of these FAQs reside below the surface. EPA's action suggests the Agency will use new theories of liability to pursue enforcement actions against PMCs. To make its intent perfectly clear, the Agency advised that "[w]ithdrawing the PMC FAQs signals that EPA plans to hold both the PMCs and the contractors they hire responsible for compliance if the circumstances indicate that both entities performed or offered to perform [qualifying] renovations." What is uncertain is how EPA's anticipated new expectations for PMCs can be implemented in practice by PMCs, especially those that contract out the hands-on renovation work to certified renovation firms.

## Background

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## Practice Areas

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The Toxic Substances Control Act (TSCA) requires EPA to “promulgate guidelines for the conduct of [covered] renovation and remodeling activities which may create a risk of exposure to dangerous levels of lead.” 15 U.S.C. § 2682(c)(1). The RRP Rule “applies to all renovations performed for compensation” in specified housing and was designed, in part, to “ensure” that “[i]ndividuals performing renovations . . . are properly trained” and “renovators and firms performing these renovations are certified.” 40 C.F.R. § 745.80. Of paramount importance for PMCs, the RRP Rule provides that “no firm may perform, offer, or claim to perform renovations without certification.”

Although “offer[ing,] or claim[ing] to perform renovations” is also in scope, the actual performance of renovation work appears to be the crux of the Rule. Indeed, EPA’s preamble to the Rule explained that it covered “firms that typically perform renovations, such as building contractors or home improvement contractors, as well as property management companies or owners of multi-family housing *performing property maintenance activities that include renovations.*”

A few years after the RRP Rule was promulgated, EPA posted numerous FQs to its website, including ones that specifically addressed PMCs’ potential liability under the RRP Rule. The two that EPA has withdrawn, effective as of March 21, 2022 are:

**Question (23002-13650):** A property management company performs most of the clerical functions of the business, and hires plumbers, electricians, carpenters, etc., for its renovation needs. Does the property management company need firm certification?

**Answer:** A property management company acts as an agent for the landlord and has the same responsibilities as the landlord under the RRP rule. Therefore, if the property management company uses its own employees to do the work, the property management company must be a certified firm and one of the employees must be a certified renovator. If the property management company hires a renovation firm to perform the renovation, the property management company does not need firm or renovator certification, but the firm the property management company hires must be certified and must perform the renovation using a certified renovator that directs and provides on-the-job training to any workers that are not certified renovators.

**Question (23002-18348):** If a property management company hires a certified firm to perform a renovation and the firm violates the RRP rule, for example, by failing to distribute the necessary materials or keep proper records, which entity is subject to enforcement action, the property manager or the certified firm?

**Answer:** It is the certified firm’s responsibility to comply with the requirements of the RRP rule, and any enforcement action taken would be against the firm.

Along with EPA’s statements at the time of the RRP Rule’s issuance, these FQs demonstrated that EPA’s intent with the RRP Rule was that it apply to those firms and individuals who actually “do the work” to perform a qualifying renovation. For over a decade, this is exactly how the Agency has applied the RRP Rule—an approach on which PMCs have come to rely and structure their businesses around.

On January 11, 2022, the Agency’s Administrator signed a Memorandum approving the withdrawal of the FQs, effective March 21, 2022. As to the significance of EPA’s actions, it is telling that the withdrawal of these FQs necessitated approval from the upper echelons of the Agency.

### **Implementation Issues for PMs**

Compliance with the RRP Rule is no small task. It requires, among other things, a certification process and an obligation to comply with specific and detailed work practice and recordkeeping requirements. EPA’s new expectation that a PMC will become a certified firm—even if they hire certified firms to conduct the renovation—creates a scenario where two or more firms must comply with the RRP Rule and its extensive obligations.

Without defining “perform[ing] or offer[ing] to perform” the qualifying renovations—terms which are also not defined in the RRP Rule itself—EPA’s Notice gives examples of activities that “may establish that a PMC is performing a renovation for compensation and must comply with the RRP rule, even if the PMC uses an independent contractor instead of its own employees to do the specific activities that disturb paint surfaces.” EPA provides examples of facts it will now take into consideration in determining whether a firm is obligated to comply with the RRP Rule when undertaking these activities on behalf of a property owner, such as:

- Soliciting and evaluating contractor bids;
- Applying for permits;
- Granting contractors access to the property;
- Overseeing contractor work on the property;
- Informing tenants of renovation activity; verifying completion of renovation activity; and
- Remitting payment to the contractors.

Regarding this list of activities the Agency’s Notice included to identify conduct that may trigger a PMC’s obligation to comply with the RRP Rule, the Agency expressed in the Memorandum that it had not drawn any legal conclusions regarding those activities. The Agency did not hesitate, however, to reaffirm that any of the identified activities performed for compensation “may” trigger compliance obligations for PMCs.

PMCs should familiarize themselves with the regulations to understand what certification entails. It is likely PMCs will need to establish new management protocols and make new investments in order to be compliant with all the requirements (e.g., three years of very detailed recordkeeping). Failure to comply with the RRP Rule could result in steep civil penalties—up to \$43,611 per day per violation—and even criminal fines of up to \$1,000,000 per violation for an organization’s *knowing* violation of the Rule.

### **What PMCs—and Similarly-Situated Firms—Should Know**

By withdrawing these FQs—and providing additional rationale and explanation for doing so through the Notice and Memorandum—EPA has effectively demonstrated its intent to begin applying the RRP Rule against PMCs in a much broader manner than the Agency has in the past.

It is unclear whether EPA will apply this new enforcement strategy for the RRP Rule in the future against similarly-situated firms or individuals, such as realtors coordinating renovations in an effort to sell a home or individuals who hire certified renovation firms to conduct covered renovations as part of a house “flipping” strategy. More, it is unclear whether this arguably new application of what constitutes “performance” under the RRP Rule will be applied to the performance of lead-based painting activities (such as lead abatement) under the Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).

Going forward, PMCs should contact their trusted counsel to understand these new obligations and make plans to comply. The potentially high penalties that can be imposed against PMCs found in violation of the Rule underscores the importance of prompt and thorough review of firm policies and procedures in the context of covered renovations. Proactive counseling may also be in order to advise PMCs—and similarly-situated firms and individuals—on options for challenging EPA’s withdrawal of the FQs in advance of an enforcement action or on defenses that might be available in the context of an enforcement action.

Wiley is well-positioned to help PMCs navigate these difficult compliance issues. Please contact Martha Marrapese for more information.