IN RE HARPOON PARTNERSHIP

TSCA Appeal No. 04-02

FINAL DECISION

Decided May 19, 2005

Syllabus

Harpoon Partnership ("Harpoon") appeals an Initial Decision of Administrative Law Judge Barbara A. Gunning (the "ALJ") assessing a civil penalty of $37,037 against Harpoon for violations of the Toxic Substances Control Act ("TSCA") section 409, 15 U.S.C. § 2689, for failure to comply with the regulatory requirements of 40 C.F.R. part 745, subpart F, "Disclosures of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"), with respect to nine units in a Chicago apartment building owned by Harpoon.

The U.S. Environmental Protection Agency ("EPA") Region 5 (the "Region") charged Harpoon with failing to include, either within the contract to lease or as an attachment to the contract to lease for each of the nine units, the Disclosure Rule's certification and acknowledgment requirements imposed on lessors, found at 40 C.F.R. § 745.113(b)(1)-(4) and (6). More particularly, these requirements include: (1) a Lead Warning Statement; (2) a statement disclosing the presence of lead-based paint or lead-based paint hazards; (3) a list of records or reports regarding lead-based paint or lead-based paint hazards; (4) a statement by the lessee affirming receipt of the appropriate disclosure information; and (5) the signatures of the lessor and lessee, certifying to the accuracy of their statements and the dates of such signature. The Region sought a civil penalty of $56,980. Harpoon's answer denied many of the Region's factual allegations and further contended that it was not subject to the Disclosure Rule's lessor requirements because it was not the "lessor" under the statute and regulations. Harpoon asserted that while it was the "owner," the property management company it had hired, Hyde Park Realty, Inc. ("Hyde Park"), instead was the "lessor." Harpoon further contended that it did not receive due process under the Fourteenth Amendment because the Disclosure Rule's language is vague and ambiguous and did not provide Harpoon fair notice of its status as a "lessor."

The ALJ issued a Partial Accelerated Decision on the legal issues surrounding whether Harpoon was a "lessor" and whether it had fair notice of its "lessor" status. She concluded that the term "lessor" does include owners such as Harpoon that hire management companies to act as their agents, and that therefore Harpoon was a "lessor" under the regulations. She further found that Harpoon had received fair notice. The ALJ subsequently issued an Initial Decision incorporating the Partial Accelerated Decision and covering the remaining issues. She found Harpoon liable for failing to include, before the lessees were obligated under their leases, either within the contracts or as attachments to the contracts, the Disclosure Rule's certification and acknowledgment requirements found in 40 C.F.R. § 745.113(b)(1)-(4) and (6). She assessed a penalty of $37,037, explaining that although the Region's proposed penalty was in accordance with factors listed in both section

16 of TSCA and the appropriate EPA penalty policy, the amount should be reduced based on considerations relating to culpability.

Harpoon raises three issues on appeal. First, Harpoon argues that it did not have fair notice of its status as a lessor under the Disclosure Rule. Second, Harpoon argues that it was not in fact liable for any violations of the Disclosure Rule, based in part on its position that certification under 40 C.F.R. § 745.113(b)(6) need not take place before a lessee becomes obligated under a lease. Third, Harpoon disputes the assessed penalty, arguing that EPA's penalty policy results in penalties that are excessive with respect to § 745.113(b) violations in general and as applied to Harpoon.

Held: The Board upholds the Initial Decision in its entirety.

(1) The Board affirms the ALJ's ruling that Harpoon had fair notice that it was a "lessor" under the Disclosure Rule. In the absence of pre-enforcement warning, a regulated party has fair notice of its obligations when that party, acting in good faith, would be able to identify with ascertainable certainty the standards to which the agency expects the party to conform. The statute and the regulations gave Harpoon fair notice that property owners offering housing for lease through a property manager are considered the "lessors" under the Disclosure Rule while their property managers are considered the "agents." In fact, the regulations set forth distinct and separate requirements for lessors and agents, making clear that owners retain their "lessor" status when they hire agents. In addition, the regulations specifically refer to owners and, in fact, use the number of units owned as the determinant of the Rule's effective date. Public statements issued by EPA further reinforce the point that owners continue to be responsible as lessors despite their hiring of a management agent. Therefore, Harpoon had fair notice that it was considered a "lessor" under the Disclosure Rule and thereby was subject to all of the Rule's lessor requirements.

(2) The Board further affirms the ALJ's findings with respect to liability. All of the 40 C.F.R. § 745.113(b) requirements must be complete at the time that the lessee becomes obligated under its lease. This includes the certification requirement of § 745.113(b)(6), which requires lessors and lessees to sign statements certifying that they have disclosed or received disclosure of the required information. Whether or not Harpoon actually disclosed to its lessees the required information regarding lead-based paint and its hazards is not at issue in the present case. The violations for which Harpoon was cited relate solely to the lack of required documentation of such disclosure in its leases, pursuant to § 745.113(b)(1)-(4) and (6). The evidence supported a finding that the required documentation was not included within or attached to the lease for any of the nine units at issue. In the absence of such documentation, the Board affirms the ALJ's ruling with respect to liability for violations of 40 C.F.R. § 113(b)(1)-(4) and (6).

(3) Finally, the Board affirms the ALJ's penalty assessment. Harpoon challenges the penalty assessment, arguing that the EPA penalty policy applied by the ALJ, which was drafted specifically for Disclosure Rule violations, should not apply to § 745.113 violations, and further that the ALJ applied this policy in a manner resulting in a penalty that was excessive with respect to Harpoon. The Board first finds that the ALJ used the appropriate penalty policy and declines to use a more general TSCA policy, as Harpoon proposes, when one specifically drafted for the Disclosure Rule exists. Further, because Harpoon is not able to produce any evidence supporting its argument that its penalty should be reduced beyond the amount by which it already was reduced by the ALJ, the Board affirms the ALJ's penalty assessment of $37,037.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Harpoon Partnership ("Harpoon") appeals an Initial Decision issued May 27, 2004, in which Administrative Law Judge Barbara A. Gunning (the "ALJ") assessed a civil penalty of $37,037 for violations of the Toxic Substances Control Act ("TSCA") section 409, 15 U.S.C. § 2689, for failure to comply with the regulatory requirements of 40 C.F.R. part 745, subpart F, "Disclosures of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule" or the "Rule"), with respect to nine units in an apartment building it owns in Chicago, Illinois. For the reasons discussed below, we reject Harpoon's arguments in this case and affirm the ALJ's finding of liability and her assessment of a $37,037 penalty.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress passed Title X of the Housing and Community Development Act of 1992 under the common name of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in part in chapters 15 and 42 of the United States Code). The stated purposes of the RLBPHRA include "develop[ing] a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible" and "educat[ing] the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." 42 U.S.C. § 4851a(1), (7).

In furtherance of those goals, RLBPHRA amended TSCA, 15 U.S.C. §§ 2601-2692. *See* RLBPHRA § 1021(a). RLBPHRA section 1018 ("Section 1018") required the Administrator of the U.S. Environmental Protection Agency (the "Agency" or "EPA") and the Secretary of the Department of Housing and Urban Development ("HUD") to promulgate regulations for the disclosure of "lead-based paint hazards in target housing which is offered for sale or lease."[1] 42

[1] "Target housing" is "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to
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U.S.C. § 4852d(a). These regulations were to require that, "before the purchaser or lessee is obligated under any contract to purchase or lease housing," the seller or lessor shall make certain disclosures relating to the presence of lead-based paint hazards to the purchaser or tenant. *Id.*

Accordingly, in March 1996, EPA and HUD jointly issued the Disclosure Rule. *See* Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing; Final Rule ("Final Lead Disclosure Rule"), 61 Fed. Reg. 9064 (Mar. 6, 1996).[2] The Disclosure Rule imposes certain requirements on the sale or lease of target housing, and places compliance responsibility on sellers, lessors, and agents. *See* 40 C.F.R. §§ 745.100, 745.107, 745.113, 745.115. In lease transactions, lessors have certain disclosure obligations under §§ 745. 107 and 745.113, while agents have separate responsibilities under § 745.115. Section 745.107 ("disclosure requirements for sellers and lessors") outlines what a prospective lessor must disclose.[3] Section 745.113 ("certification and

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reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." 42 U.S.C. § 4851b(27); 40 C.F.R. § 745.103.

[2] EPA's regulations are codified at 40 C.F.R. part 745, subpart F, and HUD's regulations are codified at 24 C.F.R. part 35, subpart H.

[3] Section 745.107 imposes the following requirements on lessors:

> (a) The following activities shall be completed before the * * * lessee is obligated under any contract to * * * lease target housing * * * :
>
> > (1) The * * * lessor shall provide the * * * lessee with an EPA-approved lead hazard information pamphlet. * * * .
> >
> > (2) The * * * lessor shall disclose to the * * * lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing * * * .
> >
> > (3) The * * * lessor shall disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being * * * leased and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards. * * * .
> >
> > (4) The * * * lessor shall provide the * * * lessee with any records or reports available to the * * * lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing * * * .
>
> (b) If any of the disclosure activities identified in paragraph (a) of this section occurs after the * * * lessee has provided an offer to * * * lease the housing, the * * * lessor shall complete the required disclosure activities prior to accepting the * * * lessee's offer and allow the

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acknowledgment of disclosure") requires that these lessor disclosures be in writing and attached to the lease; that lessees acknowledge the disclosure; and that lessors, agents (when applicable), and lessees certify to the accuracy of their statements.[4] Section 745.115 ("agent responsibilities") requires agents to ensure that the lessor has complied with all the requirements of §§ 745.107 and 745.113 or

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> * * * lessee an opportunity to review the information and possibly amend the offer.

[4] Section 745.113(b) states:

> (b) Lessor requirements. Each contract to lease target housing shall include, as an attachment or within the contract, the following elements, in the language of the contract (e.g., English, Spanish):
>
> (1) A Lead Warning Statement with the following language:
>
> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.
>
> (3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. If no such records or reports are available, the lessor shall so indicate.
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> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. § 2696.
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> (5) When one or more agents are involved in the transaction to lease target housing on behalf of the lessor, a statement that:
>
> (i) The agent has informed the lessor of the lessor's obligations under 42 U.S.C. § 4852d; and
>
> (ii) The agent is aware of his/her duty to ensure compliance with the requirements of this subpart.

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personally to ensure compliance with §§ 745.107 and 734.113.[5]

As relevant to this case, the § 745.113 acknowledgment and certification regulations require that: (1) each contract to lease target housing shall include an attachment containing a Lead Warning Statement consisting of certain language specified by the regulations, 40 C.F.R. § 745.113(b)(1); (2) each contract to lease target housing shall disclose the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence, *id*. § 745.113(b)(2); (3) each contract to lease target housing shall include a list of any records or reports that are available pertaining to lead-based paint and/or lead-based paint hazards at the target housing or a statement that no such records or reports exist, *id*. § 745.113(b)(3); (4) each contract to lease target housing shall include a statement by the lessee affirming receipt of the information specified above, *id*. § 745.113(b)(4); and (5) each contract to lease target housing shall include the signatures of the lessors and lessees certifying to the accuracy of their statements, *id*. § 745.113(b)(6). The Region did not allege violations, nor did the ALJ find violations, of § 745.107 for failure to disclose, but rather the Region alleged and the ALJ found violations of the documentation requirements of § 745.113.

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> (6) The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

[5] With respect to leases, § 745.115 states:

> (a) Each agent shall ensure compliance with all the requirements of this subpart. To ensure compliance, the agent shall:
>
> > (1) Inform the * * * lessor of his/her obligations under §§ 745.107 * * * and 745.113.
> >
> > (2) Ensure that the * * * lessor has performed all activities required under §§ 745.107 * * * and 745.113, or personally ensure compliance with the requirements of §§ 745.107 * * * and 745.113.
>
> (b) If the agent has complied with paragraph (a)(1) of this section, the agent shall not be liable for the failure to disclose to a purchaser or lessee the presence of lead-based paint and/or lead-based paint hazards known by a seller or lessor but not disclosed to the agent.

B. *Factual and Procedural Background*

1. *Factual Background*

Harpoon is a partnership comprised of six individuals. Transcript of Hearing ("Tr.")[6] at 296. Since October 1995, Harpoon has been the owner of a residential apartment building at 5134-36 South Harper Avenue in Chicago, Illinois (the "Apartment Building"), which includes 18 residential apartment units, nine of which are at issue in this matter.[7] Tr. at 297, 335-36. Since assuming ownership Harpoon has been party to an agreement with Hyde Park Realty, Inc. ("Hyde Park") whereby Hyde Park assumed responsibility for the management of the Apartment Building, including preparing leases, collecting rent, and showing available apartments to prospective tenants. Tr. at 300-02.

In December 1998, EPA Region 5 (the "Region") inspected Hyde Park's office to monitor compliance with the RLBPHRA and the Disclosure Rule. Tr. at 76-78. In April 1999, the Region issued an administrative subpoena to Hyde Park, under the authority of section 11 of TSCA, 15 U.S.C. § 2610, seeking, among other items, copies of all rental agreements and lead-based paint disclosure documentation for rental transactions at apartment buildings managed by Hyde Park from September 6, 1996, to April 29, 1999. Tr. at 77-78; Complainant's Hearing Exhibit ("C Ex") 2. On June 7, 1999, Hyde Park provided the Region with documents responsive to the subpoena, including information identifying Harpoon as the owner of the Apartment Building. Tr. at 79-84; C Ex 3, 4. In March 2000, the Region issued another subpoena to Hyde Park and received additional information confirming Harpoon as the owner of the Apartment Building. Tr. at 141-45, 149; C Ex 5, 6, 7.[8]

The Region never subpoenaed Harpoon, but after analyzing the information received from Hyde Park, sent Harpoon a general notice letter in June 2000 advising it of its liability under the Disclosure Rule. Tr. at 179, 206-207. Subsequently, by letter dated December 28, 2000, the Region advised Harpoon that it was planning to file a civil complaint against Harpoon for alleged violations of the Disclosure Rule and that the Region was authorized to assess administratively a civil penalty for the alleged violations. The Region also asked Harpoon to advise it of any factors that the Region should consider before issuing the complaint, including those related to Harpoon's ability to pay a civil penalty. C Ex 10. Harpoon did

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[6] This hearing took place before the ALJ from August 27 to 29, 2003.

[7] The units at issue in this matter are 2B, 1B, 4A, 2A, 2E, 4C, 1C, 3B, and 4B.

[8] On May 4, 2001, the Region filed a complaint against Hyde Park alleging violations of the Disclosure Rule at 520 residential units managed by the company, including the nine Apartment Building units at issue in this matter. Tr. at 168, 257, 258; C Ex 19. Hyde Park and the Region settled these allegations for $20,000 in November 2001. Tr. at 241.

not provide any financial information to the Region in response to this letter.[9] Tr. at 152-53.

2. *The Region's Complaint*

On March 18, 2002, the Region filed a complaint against Harpoon, alleging violations of the Disclosure Rule and seeking a civil penalty of $56,980. It filed an amended complaint on April 10, 2003 ("Amended Complaint"), and a second amended complaint on April 15, 2003 ("Second Amended Complaint"). The Region charged that, during the period September 6, 1996, to April 27, 1999, Harpoon, as the lessor, violated the Disclosure Rule with respect to the nine Apartment Building units. More particularly, the Region asserted that, before the lessees were obligated under their leases, Harpoon had failed to include, either within the contract to lease or as an attachment to the contract, the documents required by the Disclosure Rule's certification and acknowledgment requirements found at 40 C.F.R. § 745.113(b)(1)-(4) and (6), namely (1) a Lead Warning Statement;[10] (2) a statement disclosing the presence of lead-based paint or lead-based paint hazards;[11](3) a list of records or reports regarding lead-based paint or lead-based paint hazards;[12] (4) a statement by the lessee affirming the receipt of information set out in 40 C.F.R. § 745.113(b)(2) and (3) and a Lead Hazard Information Pamphlet required under 15 U.S.C. § 2696;[13] and (5) the signatures of the lessor and lessee, certifying to the accuracy of their statements and the dates of such signature.[14]

3. *Harpoon's Answer and Affirmative Defenses*

Harpoon filed its Answer and Affirmative Defenses to the Amended Complaint on May 20, 2002, clarified its first affirmative defense in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint on January 24, 2003, and answered the Second Amended Complaint on May 6, 2003. Harpoon denied many of the factual allegations and further contended that it was not the "lessor" as defined by the regulations because it did not offer the target property for lease or have any contact with the lessees of the target housing. It asserted that Hyde Park was the "lessor," while Harpoon was merely the "owner"

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[9] In fact, there is no indication in the administrative record that Harpoon responded to this letter at all.

[10] 40 C.F.R. § 745.113(b)(1).

[11] 40 C.F.R. § 745.113(b)(2).

[12] 40 C.F.R. § 745.113(b)(3).

[13] 40 C.F.R. § 745.113(b)(4).

[14] 40 C.F.R. § 745.113(b)(6).

and thus not subject to the lessor requirements under the Disclosure Rule. Harpoon further stated that the language of 40 C.F.R. part 745 is vague and ambiguous such that it did not provide Harpoon with adequate notice that it bore any of the responsibilities of a lessor. Respondent's Motion to Supplement Its First Affirmative Defense to the Amended Complaint (Jan. 24, 2003).

4. *The Partial Accelerated Decision*

On June 12, 2003, the ALJ directed the parties to submit briefs addressing the legal questions of whether the statutory and regulatory meaning of the term "lessor" included the owner of target housing; whether a lessor's responsibilities may be contracted away to third parties; and whether Harpoon, as the owner of the Apartment Building, had received fair notice that it was a lessor for purposes of the Disclosure Rule. On August 4, 2003, on cross-motions for a partial accelerated decision, the ALJ held that the term "lessor" does include the owner of target property, even when the owner hires a management company to act as its agent, and Harpoon had received fair notice that it was a "lessor" under the Disclosure Rule. Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision (Aug. 4, 2003) ("Partial Accelerated Decision").

5. *The Initial Decision*

The ALJ held a hearing on the remaining issues from August 27 to 29, 2003. Both the Region and Harpoon filed post-hearing briefs and reply briefs. On May 27, 2004, the ALJ issued an Initial Decision in this matter, incorporating the Partial Accelerated Decision. Initial Decision at 5. She found Harpoon liable for failing to include, before the lessees were obligated under their leases, either within the contracts or as attachments to the contracts, the Disclosure Rule's certification and acknowledgment requirements found in 40 C.F.R. § 745.113(b)(1)-(4) and (6), pursuant to both 40 C.F.R. §§ 745.113(b) and 745.100. Init. Dec. at 16. She assessed a penalty of $37,037, explaining that, although the Region's proposed penalty of $56,980 was in accordance with factors listed in both section 16 of TSCA and the appropriate EPA penalty policy,[15] the amount nevertheless should be reduced based on considerations relating to culpability. Init. Dec. at 27-28.

6. *The Appeal*

Harpoon filed this appeal on July 1, 2004, and raises three issues. First, Harpoon argues that it did not have fair notice of its status as a lessor under the

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[15] Section 18 — Disclosure Rule Enforcement Response Policy (Feb. 2000) ("Disclosure Rule Response Policy").

Disclosure Rule and, therefore, is protected by the Due Process Clause of the Fourteenth Amendment. Second, Harpoon argues that it was not actually liable for any violations of the Disclosure Rule. Its argument is based in part on its position that § 745.113(b)(6) certification need not take place before a lessee becomes obligated under a lease. Third, Harpoon disputes the assessed penalty, arguing that the penalty derived under the Disclosure Rule Response Policy is excessive as applied to § 745.113(b) violations generally and is, in any event, excessive as applied to Harpoon. Appeal Brief of Appellant Harpoon Partnership (July 1, 2004) ("Appellant's Brief"). The Region filed its Response Brief on August 9, 2004. Appellee's Response Brief (Aug. 9, 2004) ("Appellee's Brief").

III. *DISCUSSION*

The issues raised on appeal are both legal and factual, and we will consider each in turn. The Board generally reviews the ALJ's legal and factual conclusions on a de novo basis, *see* 40 C.F.R. § 22.30(f), but may apply a deferential standard of review to issues such as findings of fact when the credibility of witnesses is at issue. *See In re Billy Yee*, 10 E.A.D. 1, 13 (EAB 2001).

A. *Harpoon Had Fair Notice*

Harpoon's first argument on appeal is that it lacked fair notice that it was a lessor under the Disclosure Rule.[16] The Due Process Clause of the Fourteenth Amendment "requires that parties receive fair notice before being deprived of property." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995). Accordingly, Harpoon argues that, in the absence of fair notice, we must dismiss the complaint.

1. *The Legal Standard for Fair Notice*

To determine whether Harpoon received fair notice, in the absence of a pre-enforcement warning, we consider:

> [w]hether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "*ascertainable certainty*," the standards with which the agency expects parties to

[16] Harpoon did not appeal the ALJ's findings that it meets the statutory and regulatory definition of "lessor," and that it is prohibited from transferring its responsibilities as a lessor to Hyde Park.

> conform, then the agency has fairly notified a petitioner of the agency's interpretation.

In re Coast Wood Preserving, Inc., 11 E.A.D. 59, 80 (EAB 2003) (quoting *Gen. Elec.*, 53 F.3d at 1329) (emphasis added). The Board has further explained the "ascertainable certainty" standard as follows:

> "[P]roviding fair notice does not mean that a regulation must be altogether free from ambiguity. * * * Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community."

Id. at 81 (quoting *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000), *appeal dismissed for lack of jurisdiction*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004)).

After reviewing the statute, regulations, and public statements issued by EPA, we conclude that Harpoon should have been able to identify with "ascertainable certainty" that it met the regulatory definition of "lessor," and therefore was subject to the Disclosure Rule for the nine Apartment Building units at issue in the present case.

2. *Harpoon's Argument*

Harpoon argues that, as an owner that had hired a management company to handle the leasing process, it did not have fair notice that it was responsible for the Disclosure Rule requirements. Harpoon explains that its understanding was that its agent, Hyde Park, was responsible for the "lessor" requirements under the Disclosure Rule. In this regard, Harpoon cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 & n.18 (1982), for the proposition that any inquiry as to fair notice must consider the perspective of a reasonable person within the regulated community.[17] Appellant's Brief at 8.

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[17] It is unclear howthiscase helps Harpoon. *Village of Hoffman* involved a village ordinance regulating items that could be associated with the use of illegal drugs, including "roach clips." The ordinance did not provide a definition of "roach clip." The Court advised that a retailer easily could have determined the meaning of that term by consulting a dictionary and that therefore retailers had fair notice that roach clips were regulated. *Village of Hoffman*, 455 U.S. at 501 n.18. The Court also advised that businesses should seek clarification from regulatory agencies when regulations are unclear to them. *Id.* at 498. In the case before us, first, as is explained below, the meaning of "lessor" can be determined by reading the statute and the Disclosure Rule-consultation with a dictionary in this case is not only unnecessary, but also unlikely to help Harpoon's case. Additionally, there is no evi-
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Harpoon further contends that neither Section 1018, the Disclosure Rule, nor Agency guidance provided it with fair notice that it was subject to the Disclosure Rule's lessor requirements. First, Harpoon argues that it was not on notice of its obligations as a lessor under the statute, but rather that it reasonably understood the statute as assigning compliance responsibility to agents, because the statute does not use the term "owner" and does not define the term "lessor." *See id.* With respect to the Disclosure Rule, Harpoon similarly concludes that because the Rule mentions the term "owner" in only two sections, to establish the effective dates and to define the term,[18] Harpoon reasonably understood that substantive responsibilities did not devolve upon owners, and that "lessor" responsibilities must belong to the agent. *See id.* Harpoon also states, in support of its position, that the preamble to the final Rule does not mention "owners" as one of the classes of persons affected by the Disclosure Rule and does not address owners who hire property managers. Finally, Harpoon asserts that EPA guidance did not, until 2000, clarify that property owners were subject to the Disclosure Rule lessor requirements and that, therefore, Harpoon should not be liable for the violations that preceded this clarification.

We find, contrary to Harpoon's argument, that, prior to 2000, Harpoon did have fair notice that it was subject to the Disclosure Rule. Contrary to Harpoon's interpretation of the RLBPHRA and the Disclosure Rule, we find that the Region's interpretation of "lessor" is consistent with the statute and regulations and was ascertainable by regulated entities. Moreover, its assertion that EPA guidance did not clarify the issue until 2000 is incorrect.

3. *The Statute and Regulations Provided Fair Notice*

Harpoon asserts that the statutory language implies that compliance responsibility belongs to agents, not owners, stating that Section 1018 "does not even mention the word 'owner' and never defines the term 'lessor,' but rather places compliance responsibility on agents." Appellant's Brief at 8. However, while the statute may suggest that an agent in these transactions bears some responsibility, as discussed later in this decision, it does not transform the agent into the lessor.

Section 1018 reads: "The regulations shall require that, before the purchaser or lessee is obligated under any contract to purchase or lease the housing, the

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dence that Harpoon sought clarification from a regulatory agency with respect to its obligations under the Disclosure Rule.

[18] The Disclosure Rule defines "owner" at 40 C.F.R. § 745.103. In 40 C.F.R. § 745.102, the Disclosure Rule establishes the effective dates of the rule, based on how many dwellings the "owner" possesses. These sections are the only places in which the Disclosure Rule uses the term "owner." The Disclosure Rule otherwise refers to the regulated parties as sellers, lessors, or agents.

seller or lessor shall * * * ." 42 U.S.C. § 4852d(a)(1) (emphasis added). Although neither term is defined in the statute,[19] it is clear that the statute imposes responsibility on the seller or lessor, not the agent, and Harpoon was on notice based on the plain meaning of these terms. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

The ALJ's finding that Harpoon, as an owner, was subject to the statutory requirements for lessors is consistent with established principles of common law. At common law, the term "lessor" applies to an entity holding legal title to, or another possessory interest in, property offered for lease. Additionally, by definition, a lessor must have the power to convey a leasehold, and an agent does not have such power. Thus, a "lessor" must be an entity with possessory interest, such as an owner-lessor or a lessee-sublessor, rather than an agent, which has no such interest.

The lessor-lessee relationship commences when the lessor transfers its right to possession of the property to the lessee. *See* Restatement (Second) of Property § 1.2 (1976). To satisfy the possession requirement, "the transferred interest in the leased property must be one that the owner is legally capable of possessing now or in the future." *Id.* cmt. a. Harpoon has never alleged that Hyde Park has ever had a possessory interest in the Apartment Building, nor has Harpoon ever denied that it alone is the Apartment Building's owner. Because Hyde Park does not have a possessory interest in the Apartment Building, it cannot be a lessor under common-law principles.

The Region's interpretation is also consistent with the purpose of the statute. The Supreme Court has stated that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (citations omitted). One of the purposes of the RLBPHRA is "to educate the public concerning the hazards and sources of lead-based paint poisoning." 42 U.S.C. § 4851a(7). Section 1018 is fundamentally informational rather than remedial and its main purpose is to share information with prospective purchasers and lessees to allow them to make informed decisions. Section 1018 carries out this purpose by requiring disclosure of "any *known* lead-based paint, or any *known* lead-based paint hazards." 42 U.S.C. § 4851d(a)(1)(B) (emphasis added). Permitting an owner to transfer its reporting obligations to an agent would largely defeat the purpose of the statute. Because the statute requires disclosure of known hazards, *see id.*, allowing a knowledgeable owner to transfer its responsibilities to a less knowledgeable agent could allow

[19] The regulations later define seller and lessor, however. *See* 40 C.F.R. § 745.103.

informed owners to avoid disclosure altogether, thereby undermining the purpose of the statute, and denying purchasers and lessees the very protection that Congress intended the statute to provide.[20]

We look next to the regulations to determine if they provided Harpoon fair notice of its disclosure obligations. *Coast Wood Preserving*, 11 E.A.D. at 81. Our review of the regulations reinforces our conclusion that Harpoon received fair notice.

Harpoon argues that, because the regulations at 40 C.F.R. part 745, subpart F, refer only to the responsibilities of "lessors" and "agents," and not "owners," the Disclosure Rule does not give fair notice to owners, such as Harpoon, that have contracted with a property management company that they are subject to the regulation's "lessor" requirements. Appellant's Brief at 8.[21] The Region, however, argues that EPA has in fact given fair notice that all owners are subject to the Disclosure Rule. According to the Region, the regulations primarily use the terms "seller" and "lessor" to reflect the activities (sale or lease) that trigger an owner's obligations. When the term "lessor" is used, it is meant to distinguish "lessors" from "sellers," not to distinguish "lessors" from "owners," or to exclude owners from the definition of "lessor." Appellee's Brief at 23. After reviewing the Disclosure Rule, we agree with the Region's interpretation and find that a party acting in good faith would be able to identify with ascertainable certainty the standards with which the Agency expects parties to conform. That is, the regulated community could ascertain, and thus have "fair notice" that the owner of property could be considered either a lessor or a seller within the meaning of the Disclosure Rule, depending on the transaction at issue. *See Coast Wood Preserving*, 11 E.A.D. at 80.

The Disclosure Rule provides definitions for "owner," "lessor," and "agent." An "owner" is "any entity that has legal title to target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations, except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgagor." 40 C.F.R. § 745.103. The regulations go on to define "lessor" as "any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations." *Id.* An "agent," in turn, is "any party who enters into a contract

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[20] The regulations likewise require disclosure of only known hazards. *See* 40 C.F.R. §§ 745,107(a)(2), (3), (4), 745,113(b)(2), (3), 745.115(b).

[21] Harpoon more fully explained the arguments later advanced on appeal in its Brief Concerning Lack of Fair Notice and Nonliability of Independent Contractor, submitted to the ALJ on July 8, 2003.

with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing." *Id.*

In drafting the Disclosure Rule, EPA and HUD articulated the disclosure responsibilities of sellers and lessors. As the regulations acknowledge, in many situations, such as the present case, an agent management company also is involved.[22] The Disclosure Rule clearly distinguishes the responsibilities of sellers, lessors, and agents, thus making it plain that the responsibilities of the agent management company differ from, and in fact are less than, those of a lessor. The regulations make plain that "agent" responsibilities are separate from, not in lieu of, the responsibilities of the lessor.

Sections 735.107 and 745.113 generally require *sellers* and *lessors* to disclose certain information to purchasers and lessees and to acknowledge and certify to this disclosure by attaching related documentation to the sale or lease contract and attesting to its accuracy. In a two-party scenario of an owner contracting directly with a lessee, the disclosure requirements in § 745.107 and the acknowledgment and certification requirements in § 745.113 (at issue in the present case) clearly apply to the owner-lessor.

Section 745.115 acknowledges the practice of employing agent management companies and imposes separate compliance responsibilities on agents without altering the lessor's obligations under §§ 745.107 and 745.113. When an agent is involved, § 745.115 requires the agent to inform the seller or lessor of the seller's or lessor's disclosure obligations under §§ 745.107 and 745.113. *See* 40 C.F.R. § 115(a)(1). Furthermore, § 745.115(a)(2) requires agents to ensure that the seller or lessor has performed its duties under §§ 745.107 and 745.113, or personally to ensure compliance. *See* 40 C.F.R. § 745.115(a)(2) (requiring agents to "[e]nsure that the seller or lessor has performed all activities under §§ 745.107, 745.110, and 745.113, or personally ensure compliance with the requirements of §§ 745.107, 745.110, and 745.113.").[23] However, if the requirements of § 745.115(a)(1) are met, § 745.115(b) then absolves agents of liability for failure to disclose the presence of lead-based paint and/or lead-based paint hazards that

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[22] Harpoon does not challenge the ALJ's finding that Hyde Park was its agent. Moreover, Harpoon has not argued, nor does the administrative record indicate, that the relationship between Harpoon and Hyde Park was in any way different from a typical owner-agent relationship.

[23] This provision implements section 1018(a)(4) of the RLBPHRA, which states, "[w]henever a seller or lessor has entered into a contract with an agent for the purpose of selling or leasing a unit of target housing, the regulations promulgated under this section shall require the agent, on behalf of the seller or lessor, to ensure compliance with the requirements of this section." 42 U.S.C. § 4852d(a)(4).

the seller or lessor does not disclose to the agent.[24] *See* 40 C.F.R. § 115(b) ("If the agent has complied with paragraph (a)(1) of this section, the agent shall not be liable for the failure to disclose to a purchaser or lessee the presence of lead-based paint and/or lead-based paint hazards known by a seller or lessor but not disclosed to the agent"). Reading §§ 745.107, 745.113, and 745.115 together, it is impossible to conclude, as Harpoon argues, that the agent becomes the lessor in these situations. Section 745.115, which focuses on communications and the relationship between an agent and lessor, would be superfluous if the agent were the lessor. This is further confirmed by the definition of "agent" as a "party who enters into a contract with a seller or lessor." 40 C.F.R. § 745.103. The regulations therefore make plain that owners such as Harpoon, who hold the leasehold interest in the target housing, retain their status as "lessor" and remain obligated under §§ 745.107 and 745.113, irrespective of the participation of an agent in the leasing transaction.

Moreover, Harpoon's argument that it lacked fair notice that it was a lessor rests exclusively on the fact that the Disclosure Rule's requirements in § 745.113 refer to "lessors" rather than "owners." Harpoon's argument fails to account for the fact that the Disclosure Rule's definition of "lessor," consistent with the common law definition explained above, is written to include a range of different property interests, such as subleases.[25] *See* 40 C.F.R. § 745.101. Accordingly, the regulations must account for different types of "lessors," not just owners. In other words, it is more appropriate to refer to the §§ 745.107 and 745.113 requirements as seller and lessor requirements than as owner requirements because they are intended to apply not only to owner-lessors, but also to lessee-sublessors.

Furthermore, it is clear that EPA and HUD contemplated situations in which entities that technically own property would not have "seller" or "lessor" obligations under the regulations. For example, the Disclosure Rule excludes mortgagees from the definition of owner.[26] *See* 40 C.F.R. § 745.103. This exception, created for a particular type of owner, provides further evidence that EPA and HUD intended for all other owners who engage in leasing transactions, including those who contract with agents, to be subject to the lessor requirements.

Finally, we note that 40 C.F.R. § 745.102 differentiates the effective dates of the Rule based on the number of dwellings an owner possesses. Section

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[24] Moreover, § 745.113(b)(6) clearly requires the signatures of the lessor, lessee, *and* agent on the contract, verifying to the accuracy of their statements.

[25] For example, a lessee has the power to create a leasehold in the form of a sublease. In such a case, the original lessee would be subject to the Disclosure Rule's lessor requirements, in its capacity as sublessor.

[26] In mortgage situations, the mortgagor is considered the owner, for purposes of the Disclosure Rule. *See* 40 C.F.R. § 745.103.

745.102 states: "The requirements in this subpart take effect in the following manner: (a) For *owners* of more than four residential dwellings, the requirements shall take effect on September 6, 1996. (b) For *owners* of one to four residential dwellings, the requirements shall take effect on December 6, 1996." (emphasis added). This makes clear that the regulations apply to owners, with the terms "seller" and "lessor" being used to clarify that the activities the regulations cover are sale and lease situations.

The Region's interpretation of the statute and regulations is consistent with their plain terms. Further, the Region's interpretation is consistent with a common-sense understanding of how the Disclosure Rule delineates seller, lessor, and agent responsibilities and with common-law principles. We agree with the Region that this interpretation was ascertainable to the regulated community and that the statute and regulations thus put Harpoon on fair notice of its status as a "lessor."

4. *Public Statements Issued by the Agency Provided Fair Notice*

Although it is sufficient that the statute and regulations provided fair notice, we note that public statements available to the regulated community also provided fair notice to Harpoon. These include the preamble to the final Disclosure Rule and Agency guidance documents.

a. *The Preamble to the Final Regulations*

Harpoon argues that the preamble to the final Disclosure Rule supports its position because the preamble does not mention the "owner" as a party directly affected by the rule, but rather lists the "seller, lessor, agent, property manager, purchaser, and lessee." Final Lead Disclosure Rule, 61 Fed. Reg. at 9078. As explained above, however, the fact that the preamble does not list "owners" as affected by the Disclosure Rule reflects only that "owners" are affected to the extent that they are engaged in activities as either sellers or lessors but not otherwise.

Moreover, throughout the preamble to the final Rule, EPA often uses the term "owner" interchangeably with "seller or lessor." For example, when explaining the effective dates of the regulations, the preamble speaks of "sellers and lessors who own more than four residential dwellings," *id.* at 9069, yet the precise language of the Disclosure Rule refers to "owners of more than four residential dwellings." 40 C.F.R. § 745.102. Additionally, when describing the types of information typically available to sellers and lessors, the preamble states that both sellers and lessors would have important housing files such as titles in their possession. Final Lead Disclosure Rule, 61 Fed. Reg. at 9069. Presumably an owner but not typically an agent would have possession of such documents. The preamble also states that the agent's liability under § 745.115 is satisfied once "the agent has actually informed the seller or lessor of his/her obligation." *Id*. at 9077. The pre-

amble, like the Rule itself, makes clear by its terms that hiring an agent does not shift disclosure responsibility from an owner-lessor.

b. *Agency Guidance Documents*[27]

Finally, Harpoon argues that it was not until 2000, after the execution of the leases at issue, that EPA clarified in its guidance documents that "lessors" included owners that hired management companies. Appellant's Brief at 9. The Region argues that, to the contrary, Agency guidance published as early as 1996 also reiterated that sellers and lessors remain ultimately responsible for disclosure. Appellee's Brief at 41-42. The ALJ concluded that, although she agreed with the Region that the guidance documents were not inconsistent with, and even supported, the notion that Harpoon had been provided with fair notice, she would not reach the question of whether and when the guidance documents provided fair notice because it already was provided by the text of the Disclosure Rule and its preamble, published in the Federal Register. Partial Accelerated Decision at 19-20.

Harpoon has not argued that any pre-2000 Agency guidance confused the issue of the definition of "lessor." Rather, it asserts that confusion must have existed in order to necessitate the 2000 clarification in Office of Pollution Prevention & Toxics, EPA, Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing ("Interpretive Guidance") Part III (Aug. 2, 2000). In that document, EPA stated specifically that an agent who executes a lease with a tenant on behalf of an owner does not become both the "lessor" and the "agent" in that transaction. Interpretive Guidance Part III at 3. The Agency's statement in 2000, however, only further emphasized its position that sellers and lessors remain responsible for compliance, regardless of whether or not they have hired an agent, as articulated in Interpretive Guidance Part I (Aug. 20, 1996). In that document, the question was posed: "May a seller or lessor authorize a representative or agent to discharge the seller's or lessor's responsibilities under the rule, including signing the certification of accuracy required in the contract?" Interpretive Guidance Part I at 5. EPA responded: "Yes. The seller or lessor may authorize a representative or agent to fulfill the seller or lessor's requirements under this rule; however, *the seller or lessor is ultimately responsible for full compliance with the requirements of this rule.*" *Id.* (emphasis added). Thus, contrary to its arguments, Harpoon received fair notice, through Agency guidance documents, that it ultimately was responsible for compliance with the Disclosure Rule, regardless of its private arrangements with Hyde Park or others.

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[27] Since the ALJ did not rely on Agency guidance documents for her decision, neither do we, but we include this discussion only for completeness.

B. *The ALJ Ruled Correctly on Liability*

In its second argument on appeal, Harpoon raises legal and factual issues regarding liability. With respect to the law, Harpoon argues that the ALJ misinterpreted the 40 C.F.R. § 745.113(b)(6) certification requirement when she held that certification must occur prior to a lessee's obligation under a lease. With respect to the facts, Harpoon argues that the evidence shows that Harpoon complied with 40 C.F.R. § 745.113(b)(1)-(4) and (6) for all of the Apartment Building units at issue. Harpoon is unable to provide any documentation of its compliance with § 745.113(b), however, and relies on witness testimony to establish its case. *See* Appellant's Brief at 13-18. Harpoon's argument that it in fact complied with § 745.113(b)(6) is based on its legal argument that certification need not take place before the lessee is obligated under the lease. We agree with the ALJ that certification under § 745.113 must occur before a lessee is obligated under a lease.

1. *Acknowledgment and Certification Requirements*

The Disclosure Rule's requirements for the documentation of disclosures by lessors in leasing transactions are set forth in§ 745.113(b), which requires lessors to attach to lease agreements certain information regarding lead-based paint hazards generally and in the target housing specifically, 40 C.F.R. § 113(b)(1)-(3), along with a lessee statement affirming his receipt of this information, *id.* § 113(b)(4), and the signatures of the lessor, agent, and lessee certifying to the accuracy of their statements, *id.* § 113(b)(4). *See supra* note 4 quoting40 C.F.R. § 113(b). Additionally, with respect to timing, 40 C.F.R. § 745.100 specifies that a "lessor of target housing shall * * * attach specific disclosure and warning language to the * * * leasing contract before the * * * lessee is obligated under a contract to * * * lease target housing." *Id.* § 745.100. In addition, 40 C.F.R. § 745.107 outlines what a prospective lessor must disclose and specifies that such disclosures must occur "before the * * * lessee is obligated under any contract to * * * lease target housing." *See supra* note 3 quoting 40 C.F.R. § 107.[28]

2. *Timing of Acknowledgment and Certification*

Harpoon argues that the ALJ's conclusion that Harpoon had not fulfilled the § 745.113(b) acknowledgment and certification requirements was erroneous because her analysis is premised on the interpretation that such acknowledgment and certification must occur prior to a lessee's obligation, and that this interpretation is incorrect. Appellant's Brief at 13-16. Harpoon finds significant that the

[28] The § 745.113(b) acknowledgment and certification requirements are consistent with the disclosure requirements in § 745. 107 and use similar language. *Compare* 40 C.F.R. § 745.107 *with* 40 C.F.R. § 745.113(b); *see also* Final Lead Disclosure Rule, 61 Fed. Reg. at 9072.

regulations omit language with respect to timing in § 745.113(b), but contain specific language as to timing in both §§ 745.100 and 745.107. Harpoon does not in fact dispute that the "disclosure and warning language" required by § 745.113(b)(1)-(4) must be provided to a prospective lessee before the lessee is obligated under the contract, since § 745.100 requires that such disclosure and warning must occur "before the * * * lessee is obligated under any contract to lease target housing." 40 C.F.R. § 745.100. However, Harpoon argues that the requirements of neither § 745.100 nor § 745.107 apply to the § 745.113(b)(6) certification requirement. *See* Appellant's Brief at 14-15. Harpoon argues:

> The Lead Disclosure Rule requires only that disclosure and warning language be attached to (or part of) a leasing contract 'before the . . . lessee is obligated under a contract to . . . lease.' § 745.100 (stating the purpose of the Rule and *not* requiring certification prior to a lessee's obligation), and that specific disclosure be made prior to the lessee being obligated, § 745.107(a). *Separately*, the Lead Disclosure Rule requires that the lessor and the lessee certify by their signatures and dates that the disclosures have been made. § 745.113(b).

Appellant's Brief at 14-15. Harpoon goes on to assert that, unlike actual disclosure under § 745.107, the certification requirement is thus not tied to the date by which a lessee becomes obligated under a lease. Harpoon then argues that somehow the ALJ erroneously compressed the § 745.113(b)(1)-(4) requirements into a finding of a § 745.113(b)(6) failure to certify.Appellant's Brief at 15. We find Harpoon's argument in this respect somewhat unclear, but it is based on a faulty premise in any event.

Harpoon's argument fails because the terms of § 745.113(b), itself, clearly require that all of the § 745.107 disclosure information, along with a statement by the lessee affirming receipt of the information and the signatures of the lessor and lessee certifying to the accuracy of their statements, be "include[d], as an attachment or within the [leasing] contract." § 745.113(b). At no point does the Region allege, nor does the ALJ find, that Harpoon violated § 745.107 by failing to disclose. *See* Init. Dec. at 14; Appellee's Brief at 72. Because the Region brought only § 745.113(b) charges, we will not reach the issue of whether or not Harpoon in fact made the appropriate disclosures to its tenants before they were obligated under their leases. Our inquiry will focus solely on whether Harpoon included the appropriate disclosure documentation in or attached to the leases, as required by § 745.113(b).

The thrust of Harpoon's argument appears to be that because § 745.113(b) does not specify that the elements must be included "before" or "prior to" lessees being obligated under their contracts, they may be included at any time before *or*

after the lessee's obligation under the lease, except as otherwise required by either § 745.107 or § 745.100 (which it argues do not apply to the certification requirement). We do not find this argument compelling. Section 745.113(b) requires the elements to be "included" in the lease. We take that to mean at all times the lease is in effect. Whether, as a technical matter, "inclusion" takes place before or simultaneously with the signing of the lease is of no practical difference. But it is impossible to conclude that elements can be "included" in a lease in satisfaction of the Disclosure Rule when they are attached or otherwise included *after* the parties have already become obligated and the lease has been in effect for some period of time. This interpretation is consistent with § 745.100, which requires the disclosure and warning language to be attached "before the * * * lessee is obligated under a contract to purchase or lease target housing." 40 C.F.R. § 745.100. Once the lease is completed without the requisite inclusion of the § 745.113(b) acknowledgment and certification, a violation exists. Later inclusion may then bring the lease into compliance, but it does not cure the previous violation.

Additionally, the preamble to the final rule clarifies the Disclosure Rule's timing requirements and clearly contradicts Harpoon's argument that the 113(b) requirements need not be completed before the lessee becomes obligated. The preamble states that "lessors must provide the information and complete the disclosure portions of the lease (or attachment) *before* the lessee becomes obligated under a contract to lease the housing." Final Lead Disclosure Rule, 61 Fed. Reg. at 9071 (emphasis added). It then defines the "components of full disclosure" to include all elements of § 745.113(b), including (b)(6). *Id.* at 9071-92. The preamble thereby clarifies any alleged ambiguity related to the lack of the use of "before" or "prior to" in § 745.113(b) or to the application of § 745.100's timing requirement to § 745.113(b)(6). *See* Appellant's Brief at 14-15. According to the preamble, all § 745.113(b) requirements must be completed prior to a lessee's obligation under a lease.

Notwithstanding the wording of the Disclosure Rule and the amplification provided in the preamble, Harpoon argues that EPA guidance documents support the notion that it is permissible for certification to occur after lease execution. Harpoon states that "USEPA guidance assumes that lessors who do not receive a signed and dated lead Disclosure Form will later follow-up with the tenant," and cites to Interpretive Guidance Part II. Appellant's Brief at 17. In this guidance document, EPA offers the following guidance to lessors in Question 47:

> How do lessors fulfill their disclosure requirements when lessees refuse to accept the lead information pamphlet and/or refuse to sign the disclosure forms?
>
> When a lessee is unavailable for signature or refuses to accept the pamphlet and/or sign the disclosure form, lessors may certify attempted delivery of the pamphlet, dis-

> closure information, and disclosure form. This certification may be included on the copy of the disclosure form retained by the lessor or attached to that disclosure form and should indicate exactly how delivery was attempted and what occurred (e.g., sent material certified mail and never heard from lessee; lessee refused to sign disclosure form). For example,
>
> lessors may deliver the pamphlet, disclosure information, and disclosure form by certified mail, return receipt requested. Lessors should then retain the signed certified mail receipt in their records as evidence that the material was delivered to the lessees. In cases where the lessee refuses to sign the disclosure form, lessors may certify in writing that the delivery was attempted and indicate why a signed and dated disclosure form could not be obtained.

Interpretive Guidance Part II at 8-9. Harpoon argues that this EPA statement supports its position that it is unfair and unacceptable to find a lessor in violation of the Disclosure Rule when the lessor must rely on the cooperation of non-regulated lessees to comply. *See* Appellant's Brief at 19.

We find Harpoon's argument unpersuasive here. First, Question 47 applies solely to those cases in which compliance cannot be obtained because lessees are unavailable or unwilling to cooperate. Harpoon has offered no evidence indicating that any of its lessees meet this condition. Moreover, in cases where lessees are unable or unwilling to comply, EPA guidance requires the lessors to document and certify to their delivery attempts. Again, Harpoon has provided no evidence that it followed the procedures detailed in the guidance. Therefore Question 47 does not support Harpoon's argument.

Harpoon additionally argues that the ALJ's decision reflects a misunderstanding of the rental industry, and asserts her decision would force lessors to forego entering into leases when lessees fail to or refuse to sign Lead Disclosure Forms, and moreover would force lessees to be evicted when they do not sign such forms at the time of lease renewal. Since Harpoon provided no evidence that any lessees were presented with the appropriate forms at the time of leasing or lease renewal and failed or refused to sign them, we need not address that circumstance here, other than to note that it is addressed in Question 47, as just discussed.[29]

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[29] Evidence produced by Harpoon demonstrates that its practice was to obtain from tenants a new lease "renewing" their lease obligations at the end of the previous lease's term. We fail to under-
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Moreover, we disagree with Harpoon's attempt to characterize § 745.113(b) as merely containing unimportant record-keeping requirements. As explained in the preamble to the Disclosure Rule, "the completion and retention of disclosure and acknowledgment language is a necessary component of any effective, enforceable disclosure requirement for leasing transactions." Final Lead Disclosure Rule, 61 Fed. Reg. at 9071. Without a requirement that parties certify that the appropriate lead-hazard information has been disclosed, the regulatory agencies would be forced to ascertain compliance by contacting individual tenants, relying on their record-keeping and memories.[30] Therefore, we recognize the importance of the § 745.113(b)(6) requirements and are not persuaded by Harpoon's attempts to mischaracterize them as insignificant elements of the regulatory scheme. The purpose of the Disclosure Rule would be defeated without these documentation requirements.

3. *Unit 1B — Michael Ahmed*

Harpoon is able to produce evidence of having made the appropriate lead-based paint disclosures with respect to only one unit, 1B, occupied by Michael Ahmed. Harpoon offers witness testimony intended to establish that Harpoon complied with § 745.113(b)(1)-(4) by providing to Mr. Ahmed a Lead Disclosure Form containing the § 745.113(b) elements and an EPA lead warning pamphlet. Based on this witness testimony, Harpoon argues that the only violation the ALJ justifiably could have found was a minor violation of § 745.113(b)(6) for improper certification because the Lead Disclosure Form was not dated by Harpoon or its agent.[31]

Although the ALJ found Mr. Ahmed's testimony that he received a Lead Disclosure Form and EPA pamphlet when he received his original lease for Unit

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(continued)
stand why Harpoon could not have included the appropriate disclosure information in these leases. Six renewal leases during the violation period were produced, but none contains the appropriate disclosure documentation. *See* C Ex 4, att. 1-4, 6.

[30] Indeed, if there were no specific time by which certification was required to occur, the requirement would be essentially unenforceable.

[31] The Lead Disclosure Form signed by Mr. Ahmed is a form on Hyde Park letterhead that contains identical language to the Sample Disclosure Format for Target Housing Rentals and Leases form provided in the preamble to the final rule. *See* 61 Fed. Reg. 9074. This form contains a lead warning statement; a section requiring the lessor to state whether or not it has knowledge, records, or reports relating to lead-based paint or lead-based paint hazards; a section where the lessee acknowledges receiving such information and the EPA pamphlet; a section where the agent acknowledges having informed the lessor of his obligations; and a section for the lessor, lessee, and agent separately to certify to the accuracy of their statements. EPA and HUD suggest that such a disclosure form, if completed correctly, would satisfy the § 745.113(b) requirements. *See id.* at 9073. Harpoon states that its practice, through its agent Hyde Park, was to provide these same Lead Disclosure Forms to all tenants. Appellant's Brief at 17.

1B in December 1997, Tr. at 449, to be "somewhat credible," Init. Dec. at 14, she correctly determined that the testimony failed to show that Harpoon was in compliance with § 745.113(b)(1)-(4). Mr. Ahmed's testimony presumably would have been relevant to a § 745.107 inquiry into whether or not he actually received the appropriate disclosure information. His testimony does nothing, however, to demonstrate that the disclosure documentation was included in the lease, as is required by § 745.113(b)(1)-(4). Mr. Ahmed's testimony likewise is not persuasive in establishing compliance with § 745.113(b)(6). Mr. Ahmed's lease is dated December 22, 1997. He testified that he moved into unit 1B on January 1, 1998, and that he signed a Lead Disclosure Form on January 3, 1998, which he proffered at the hearing.[32] Even assuming the truth of Mr. Ahmed's testimony and the veracity of the documents, this does not demonstrate that Harpoon was in compliance with § 745.113(b)(6). The lease was dated December 22, 1997, but the Lead Disclosure Form was dated by Mr. Ahmed two weeks after that, on January 3, 1998. Thus, the record does not establish that § 745.113(b)(6) certification occurred prior to or concurrent with the execution of the lease.

4. *The Other Eight Units at Issue*

Harpoon next argues that the testimonial evidence related to Unit 1B and Mr. Ahmed, along with additional testimony from the president of Hyde Park and the managing partner of Harpoon, should apply to our consideration of the other eight Apartment Building units at issue, because it helps to establish Hyde Park's general practices with respect to the Disclosure Rule. Additionally, Harpoon asks us to consider a set of "reminder letters" that Hyde Park had sent to lessees, reminding them to sign and return their Lead Disclosure Forms, as evidence that Harpoon had, in fact, made the necessary disclosures. Appellant's Brief at 16-17.

First, as explained above, the Region has not charged Harpoon with failing to disclose under § 745.107, but rather with failure to include the disclosure documentation as part of the leases, under § 745.113(b). Therefore, establishing "general practices" of disclosure without providing the actual documentation showing inclusion of the required elements in the specific leases at issue is not helpful to our inquiry. Second, the reminder letters are not only unpersuasive, but they in fact serve to defeat Harpoon's argument. Section 745.113(b) requires that the disclosure information be attached to the lease. Each of the six reminder letters admitted into evidence was dated February 10, 1999, or later, between one and eight months after the lessee became obligated under his or her respective leasing con-

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[32] The Lead Disclosure Form provided pursuant to the Region's April 1999 subpoena was dated March 31, 1999. The earlier January 3, 1998 form proffered by Mr. Ahmed at the hearing actually was dated January 3, 1997. Mr. Ahmed testified that it should have been dated January 3, 1998, however. We find the explanation of the misdating plausible, given that it was dated at the beginning of the calendar year. This Lead Disclosure Form apparently had remained in Mr. Ahmed's possession until the hearing. *See* Init. Dec. at 13-14.

tract. *See* C Ex 4, Att. 1, 5-9. These letters provide evidence that the disclosure information was not included in the lease when the lessee became obligated, which is a violation of § 745.113(b).[33]

For the reasons discussed above, we affirm the ALJ's legal and factual conclusions with respect to liability, finding that Harpoon, as the lessor, violated 40 C.F.R. § 745.113(b)(1)-(4) and (6) for all nine of the Apartment Building units at issue.

C. *The Record Supports the ALJ's Penalty Assessment*

Harpoon also appeals the ALJ's penalty assessment, arguing that the Disclosure Rule Response Policy[34] should not be applied to § 745.113 violations. Harpoon additionally argues that the ALJ applied the Disclosure Rule Response Policy excessively to Harpoon. Having affirmed the ALJ's findings with respect to liability, our only remaining task is to consider whether she assessed an appropriate penalty for these violations.

Harpoon first argues that the Disclosure Rule Response Policy should not have been applied to this case because the violations involved were "data-gathering" in nature, rather than of a "hazard-assessment" nature. According to Harpoon, EPA's general TSCA Civil Penalty Guidelines, 45 Fed. Reg. 59,770 (Sept. 10, 1980), suggest that a lower penalty should be applied for such "data-gathering" violations, because they pose a lesser probability of harm to the public. *See* Appellant's Brief at 23. The Disclosure Rule Response Policy, which was based on the TSCA Civil Penalty Guidelines, does recognize that these more general guidelines distinguish various natures of violations, yet it specifically categorizes all Disclosure Rule violations as being "hazard assessment" violations because they involve a potential lessee's ability to weigh and assess the risks presented by the possible presence of lead-based paint or lead-based paint hazards in target housing. *See* Disclosure Rule Response Policy at 9. This rationale appears sound. In effect, by arguing that § 745.113(b) violations are "data-gathering" violations instead, Harpoon is asking the Board to substitute a general TSCA penalty policy when a policy specifically drafted for the Disclosure Rule properly applies. We decline to circumvent the purpose of drafting a penalty policy specifically applicable to Disclosure Rule cases and accordingly will evaluate the ALJ's

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[33] Moreover, as the ALJ notes, Hyde Park likely sent out these letters primarily because the December 1998 EPA investigation prompted it to review its records and discover that it was not in compliance with the Disclosure Rule. *See* Init. Dec. at 12.

[34] *See supra* note 15.

penalty decision based on the Disclosure Rule Response Policy.[35]

Harpoon next argues that the ALJ did not go far enough in reducing the Region's proposed penalty by 35%. The ALJ reduced the proposed penalty based on criteria related to culpability, by the 25% allowable under the general TSCA Civil Penalty Guidelines, 45 Fed. Reg. at 59,773, and by an additional 10% based on her discretion. Init. Dec. at 27. She made this reduction notwithstanding the fact that the Disclosure Rule Response Policy provides for only an upward adjustment for culpability-related issues. *See* Disclosure Rule Response Policy at 15. Therefore, in reaching this 35% reduction, the ALJ departed from both the Disclosure Rule Response Policy and the TSCA Civil Penalty Guidelines in a way that favored Harpoon.

The ALJ explained this departure by citing numerous Board decisions allowing the ALJ to use her discretion in penalty calculations and depart from penalty policies as long as she adequately explains her reasons for doing so. *See* Init. Dec. at 17-18. Because the Region did not appeal the ALJ's departure from the penalty policies, we will not reach the issue of whether or not her reduction was appropriate. *See* Appellee's Brief at 107. Harpoon bases its argument that the ALJ should have further reduced the proposed penalty largely on attitude-related criteria. *See* Appellant's Brief at 25. The components of "attitude" are (1) cooperation, (2) immediate good faith efforts to comply, and (3) timely settlement. Disclosure Rule Response Policy at 16. Harpoon has not provided evidence of any of these three factors that would warrant a further reduction. If anything, we find the ALJ's 35% reduction in the Region's proposed penalty, resulting in a total penalty of $37,037 against Harpoon, to be generous. However, as noted above, since the Region did not appeal the penalty determination, we will not disturb it.

IV. *CONCLUSION*

In accordance with the above discussion and pursuant to TSCA section 16(a), 15 U.S.C. § 2615(a), and RLBPHRA section 1018, Harpoon hereby is assessed a civil administrative penalty of $37,037 for its violations of the EPA regulations at 40 C.F.R. part 745, subpart F. Harpoon shall pay the full amount of the penalty within 30 days of receipt of this final order. Payment shall be made by

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[35] Harpoon also argues that the Disclosure Rule Response Policy is unfair as applied to § 745.113(b) because it allows for each subsection of § 745.113(b) to be a separate violation, with a separate penalty, essentially reasoning that because all of the § 745.113(b) requirements can be completed using one disclosure form, they all should be combined into one violation with one maximum penalty (resulting in a significantly lower total penalty). *See* Appellant's Brief at 24. We find this argument unpersuasive and note that the ALJ has discretion to minimize the total penalty by not assigning the maximum penalty to each violation, as she has done in the present case.

forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

EPA-Region V
Regional Hearing Clerk
P.O Box 70753
Chicago, IL 60673

So ordered.