



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 20 2019

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Lead-Based Paint Graduated Penalty Approach Policy

FROM: Susan Parker Bodine

A handwritten signature in blue ink, appearing to read "Susan Parker Bodine".

TO: Enforcement and Compliance Assurance Division Directors, Regions 1-10
Regional Counsels, Regions 1-10

This memorandum transmits the *Lead-based Paint Graduated Penalty Approach Policy for Small-Scale Businesses* (GPA Policy). The GPA Policy is an addendum to the *Consolidated Toxic Substances Control Act (TSCA) Lead-based Paint Enforcement Response and Penalty Policy* (TSCA ERPP).¹ The GPA Policy provides criteria to determine eligibility and a methodology for reducing penalties in certain lead-based paint settlements. The GPA Policy is effective immediately.

Background on the Renovation, Repair and Painting (RRP) Program

The EPA's 2008 Lead-Based Paint Renovation, Repair and Painting (RRP) Rule (as amended in 2010 and 2011), aims to protect the public from lead-based paint hazards associated with renovation, repair and painting activities. The RRP Rule added an enormous regulated universe to the lead-based paint compliance and enforcement program, including over a million firms and contractors performing approximately 10 million renovations a year. The RRP industry varies greatly by company size and type, however the majority of RRP entities are small enterprises with limited annual revenue.

Given the large number of smaller entities, the Office of Enforcement and Compliance Assurance (OECA) and Regional compliance assurance and enforcement efforts have focused on maximizing the impact of compliance monitoring and enforcement outcomes. For example, consistent with OECA's National Program Guidance,² Regions are prioritizing RRP investigations of regulated entities that have a large footprint and far-reaching influence on the compliance landscape, as well as firms that operate through multiple locations across the nation or that develop televised renovation programs that show noncompliant renovations. Regions are also prioritizing Geographic Initiative Approaches (also known as Lead Hot Spots or Place-based Initiatives), based on consideration of factors such as high rates of noncompliance or elevated blood-lead levels, age of housing stock and environmental justice concerns, to ensure that the EPA's coordinated compliance and enforcement efforts have the greatest impact on

¹ *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* (Aug. 2010, Updated Apr. 5, 2013),

<https://www.epa.gov/enforcement/revise-interim-final-consolidated-enforcement-response-and-penalty-policy-pre>.

² Final OECA FY2020-2021 *National Program Guidance*; <https://www.epa.gov/planandbudget/national-program-guidances>.

reducing lead exposures. These actions are one way that enforcement supports the Federal Lead Action Plan.³

While Regions strive to focus enforcement resources on developing high impact cases, they frequently find significant noncompliance at smaller entities where a formal enforcement action is the most appropriate response. Regions should continue to develop appropriate enforcement and compliance actions to address RRP Rule violations using the Gravity-based Penalty (GBP) matrix in the TSCA ERPP.⁴ However, for much smaller entities, Regions may choose to use the GPA policy which provides an additional approach for penalty calculation. The GPA Policy provides an additional tool to allow the EPA to quickly address violations and help ensure that future renovations are compliant.

GPA Policy

The GPA Policy provides potential penalty reductions to small-scale respondents with a pre-tax (unadjusted) gross annual revenue of no more than \$2,000,000 or a net worth of no more than \$600,000.⁵ The GPA Policy may be used in RRP Rule settlements resolved under the TSCA ERPP. For TSCA ERPP settlements, the GPA Policy methodology generates a fractional multiplier that, when multiplied by the ERPP gravity-based penalty, results in a reduced GPA-generated penalty. For settlements under the *Lead-based Paint Expedited Settlement Agreement Policy* (ESA Policy⁶), the GPA Policy's eligibility criteria determine whether a respondent may qualify for the lower flat penalty under the ESA Policy's two-tier penalty structure.

Background on Development of the GPA Policy

To help Regions resolve violations against small entities quickly and fairly, OECA piloted two penalty reduction approaches. First, OECA issued the *Pilot RRP Penalty Program for Micro-Businesses* (Micro-business Penalty Pilot) in 2012.⁷ This pilot provided an alternative ERPP gravity-based penalty matrix that assessed a lower GBP for respondents with annual sales of \$300,000 or less. Responding to the Regions' requests for further penalty flexibility, OECA then issued the *Pilot Graduated Penalty Approach for TSCA RRP Rule and Abatement Rule Enforcement Settlements* (GPA Pilot) in 2017,⁸ as an alternative to the Micro-Business Penalty Pilot. The GPA Pilot adopted the graduated penalty methodology that the EPA established in its 1994 Clean Air Act Civil Penalty Policy,⁹ with adjustment for inflation since 1994.

³ See *Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts* (Dec. 2018), https://www.epa.gov/sites/production/files/2018-12/documents/fedactionplan_lead_final.pdf.

⁴ *Consolidated Enforcement Response and Penalty Policy for the Pre-renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-based Paint Activities Rule*, <https://intranet.epa.gov/oeca/oce/wced/lpbdocuments/revisedlbpcconsolidatederrp040513.pdf>.

⁵ Note that this GPA Policy is in addition to other EPA small business resources. See e.g. <https://www.epa.gov/resources-small-businesses>.

⁶ Kenneth C. Schefski, Acting Director, WCED/OCE/OECA, *Lead-Based Paint Expedited Settlement Agreement Policy* (Aug. 19, 2015), <http://intranet.epa.gov/oeca/oce/wced/lpbdocuments/lbpesapolicy081915.pdf>.

⁷ Rosemarie A. Kelley, Director, WCED/OCE/OECA, *Pilot RRP Penalty Program for Micro-Businesses* (May 3, 2012), <http://intranet.epa.gov/oeca/oce/wced/lpbdocuments/microbusiness0512.pdf>.

⁸ Gregory Sullivan, Director, WCED/OCE/OECA, *Pilot Graduated Penalty Approach for TSCA RRP Rule and Abatement Rule Enforcement Settlements* (Mar. 5, 2017), <http://intranet.epa.gov/oeca/oce/wced/lpbdocuments/lbpgpilot0305.pdf>.

⁹ *Appendix X Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant* (June 1, 1994), https://www3.epa.gov/ttn/caaa/t6/memoranda/608_pp.pdf.

In Spring 2018, the EPA surveyed the Regions to evaluate their experience in implementing both the Micro-business Penalty Pilot and the GPA Pilot. Regions overwhelmingly supported finalization of a single approach: the GPA Pilot. In Autumn 2018, the Micro-Business Pilot expired while the GPA Pilot continued in effect. The GPA Policy announced today fulfills the Regions' request that the GPA Pilot be finalized as an addendum to the TSCA ERPP. The GPA Policy uses the same eligibility criteria and methodology as used in its predecessor GPA Pilot.

Conclusion

The GPA Policy offers Regions a tool for advancing the agency's interest in quick return to compliance and fair case resolutions. We appreciate the Regions' testing of the GPA Pilot and input in formulating the GPA Policy. Questions about this policy should be directed to Stephanie Brown of the Chemical Risk Reporting and Enforcement Branch in the Office of Civil Enforcement's Waste and Chemical Enforcement Division at brown.stephanie@epa.gov.

Attachment

Appendix E to the TSCA Consolidated ERPP

Graduated Penalty Approach Policy For Small-Scale Businesses

I. Purpose

For eligible respondents, the *Lead-based Paint Graduated Penalty Approach Policy for Small-Scale Businesses* (GPA Policy) provides eligibility criteria and a methodology for reducing penalties in certain settlements. The GPA Policy may be used in Renovation, Repair and Painting (RRP) Rule settlements resolved under the *TSCA Lead-based Paint Consolidated Enforcement Response and Penalty Policy* (TSCA ERPP).¹ The GPA Policy also may be used in settlements under the *Lead-based Paint Expedited Settlement Agreement Policy* (LBP ESA Policy).² The GPA Policy does not apply to RRP training provider cases.

The Region may exercise discretion in determining whether to use the GPA Policy. Although a respondent may meet the eligibility criteria under this policy, a respondent is not automatically entitled to a GPA penalty reduction. The Region should consider the facts and circumstances in the case, such as the nature of the violation; the extent, nature and reliability of the documentation to support a GPA penalty reduction; and other appropriate factors. For example, GPA may not be appropriate when the totality of material for consideration by the Region contains information that is inconsistent or conflicts with the documentation available in support of the violator's purported GPA eligibility.

II. Eligibility Criteria

Eligibility is limited to respondents that have a *pre-tax (unadjusted) gross annual revenue* of \$2,000,000 or less, or a *net worth* of \$600,000 or less, as supported by appropriate evidence. *See* Financial Documentation, below. Regions should document eligibility (Section V, below).

III. Methodology

A. Application in ERPP Settlements

Settlements under the TSCA ERPP use both the GPA Policy's eligibility criteria listed above and its methodology. The methodology generates a fractional "multiplier" that reduces the gravity-based penalty (GBP) otherwise imposed under the TSCA ERPP's penalty matrix. The GPA-generated penalty thus becomes the new gravity-based penalty and may be adjusted upward or downward in accordance with applicable TSCA factors. In addition, Regions should calculate and recover the economic benefit from non-compliance, as appropriate.

¹ *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* (Aug. 2010, Updated Apr. 5, 2013), <https://www.epa.gov/enforcement/revised-interim-final-consolidated-enforcement-response-and-penalty-policy-pre>.

² Kenneth C. Schefski, Acting Director, WCED/OCE/OECA, *Lead-Based Paint Expedited Settlement Agreement Policy* (Aug. 19, 2015), <http://intranet.epa.gov/oeca/oce/wced/lpbdocuments/lbpsapolicy081915.pdf>.

B. Application in LBP ESA Settlements

For settlements under the *LBP ESA Policy*, Regions should use the *GPA Policy* eligibility criteria (Section II, above) to determine which flat-rate penalty applies. The *LBP ESA Policy* establishes two flat-rate penalties: \$1,000 per violation for most respondents, and \$200 per violation for very small entities. Regions should use the GPA criteria to determine whether a respondent is eligible for the lower ESA flat-rate penalty.

Regions should *not* use the *GPA methodology* (Section IV, below) to determine the ESA penalty. To efficiently resolve violations, ESAs use the foregoing two-tier flat-rate structure instead of the TSCA ERPP. There are no penalty reduction calculations; ESA penalties are not subject to adjustment upward or downward under the ERPP adjustment factors.

IV. Using the GPA Policy Methodology

For TSCA ERPP settlements, the GPA methodology generates a fractional “multiplier” that reduces the gravity-based penalty otherwise obtained under the ERPP penalty matrix, as stated below. Figure 1 (at the end of this document) illustrates this methodology in the form of a hypothetical.

- Step 1. **Determine the gravity-based penalty** using the applicable Gravity-based Penalty Matrix in the TSCA ERPP, Appendix B. Remember that the penalty amounts stated in the ERPP matrix may have been adjusted for inflation over time.³

- Step 2. If respondent documents its eligibility (per Section V, below), then **calculate the GPA multiplier** based on the respondent’s financial documentation (see Section V, below):
 - If using gross annual revenue, then divide the respondent’s gross annual revenue by \$2,000,000, *or*
 - If using net worth, then divide the respondent’s net worth by \$600,000.The resulting quotient is the **GPA multiplier**. This number will be less than 1.

$\frac{\text{Respondent's gross annual revenue}}{\$2,000,000} \quad \text{or} \quad \frac{\text{Respondent's net worth}}{\$600,000} = \text{GPA Multiplier}$
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- Step 3. **Obtain the GPA-generated penalty** by multiplying the ERPP gravity-based penalty (Step 1) by the GPA Multiplier (Step 2).

$\text{ERPP GBP (Step 1)} \times \text{GPA Multiplier (Step 2)} = \text{GPA-generated GBP (Step 3)}$
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³ Refer to EPA’s annual Penalty Inflation Adjustment Rule and guidance, e.g., <https://www.epa.gov/enforcement/transmittal-2019-annual-civil-monetary-penalty-inflation-adjustment-rule>

Step 4. **Adjust the GPA-generated penalty** (Step 3) upward or downward by applying the ERPP's adjustment factors and recover the economic benefit from non-compliance, as specified in the TSCA ERPP, Section 3. (As stated above, this step does not apply to ESAs. See Section III, B.)

V. **Financial Documentation**

To ensure transparency, accuracy and fairness in implementing the GPA Policy, the case file must include adequate documentation confirming the respondent's eligibility for a GPA penalty reduction. The Region should use the following, in order of preference: (a) the respondent's federal income tax filing⁴; (b) the respondent's actual financial records, such as sales and balance sheets; or (c) publicly-available sales, revenue and/or income documentation, such as reports from Dun & Bradstreet or American Business Directory. If these are not available, then the Region may use a certified statement provided by the respondent's certified public accountant which attests to the respondent's financial situation, or another form of reliable documentation.⁵

The documentation should cover at least the most recent two (2) full years of business operation, but documentation covering only the most recent year of operation may be acceptable in appropriate circumstances (e.g., for a recently established business). In limited situations, the Region may consider trends or average financials over a limited number of recent years, such as where a violation occurred in Year 1 but income decreased, or increased, significantly in Years 2 and 3. This approach should be used only given compelling and reliable evidence of a substantial change.⁶

When a respondent is eligible on the basis of both gross annual revenue and net worth, the Region should consider factors such as the following, in choosing which measure to apply: (a) the comparative type and extent of documentation available for each; (b) the relative currency (how recent) and reliability of the documentation for each; and (c) the Region's objective determination regarding which set of data and analysis more accurately represents the respondent's actual financial situation given the totality of facts and circumstances in the case.

⁴ Gross revenue may be calculated as gross sales/receipts minus returns and allowances. Gross revenue is reported on federal taxes at Form 1120, Line 1, or at Form 1040, Schedule C, Line 3. Net worth is calculated as total assets minus total liabilities. Total assets and total liabilities are reported on Form 1120, Schedule L. Regions should calculate net worth as that figure is not calculated for federal income tax purposes.

⁵ Where no verifiable independent information is available, the Region may accept a self-certification in which the respondent describes its financial situation at risk of penalty under federal law (e.g., 18 U.S.C. § 1001). Also, Regions should include in any settlement agreement an appropriate certification by which the respondent attests to the truth and completeness of financial information that it supplied to EPA at risk of penalty under federal law (e.g., 18 U.S.C. § 1001), and potential nullification of the penalty reduction.

⁶ EPA generally will not collect a civil penalty that exceeds a company's financial capacity as evidenced by reliable documentation and analysis. However, having insufficient resources for environmental compliance does not obviate a company's environmental responsibilities. It is important that GPA penalty reductions are fully merited and do not encourage the regulated community to choose noncompliance as a way of aiding financially troubled businesses.

Figure 1. GPA Policy Hypotheticals

ERPP Scenarios: Assuming for *illustrative purposes* an ERPP Gravity-based Penalty is \$15,300.

		<u>Gross Annual Revenue (GAR) Scenario</u> Respondent's GAR is \$301,000	<u>Net Worth (NW) Scenario</u> Respondent's Net Worth is \$450,000.
Confirm respondent's eligibility for the GPA Policy.			
Step 1	↓		
	Determine TSCA ERPP Gravity-based Penalty (GBP) (\$15,300 in scenario).		
Step 2	↓		
	Calculate GPA Multiplier based on financial documentation:		
	$\begin{aligned} & \$301,000 \text{ (GAR in scenario)} \\ & \div \$2,000,000 \text{ (Policy's max. GAR)} \\ & = \mathbf{0.1505} \text{ (GPA Multiplier).} \end{aligned}$	$\begin{aligned} & \$450,000 \text{ (NW in scenario)} \\ & \div \$600,000 \text{ (Policy's max. NW)} \\ & = \mathbf{0.75} \text{ (GPA Multiplier).} \end{aligned}$	
Step 3	↓		
	Obtain the GPA-generated GBP:		
	$\begin{aligned} & \$15,300 \text{ (ERPP GBP in scenario)} \\ & \times \mathbf{0.1505} \text{ (GPA Multiplier) (Step 3)} \\ & = \mathbf{\$2,303} \text{ GPA penalty (\$2,302.65 rounded)} \end{aligned}$	$\begin{aligned} & \$15,300 \text{ (ERPP Penalty in scenario)} \\ & \times \mathbf{0.75} \text{ (GPA Multiplier) (Step 3)} \\ & = \mathbf{\$11,475} \text{ GPA penalty} \end{aligned}$	
	(Instead of the ERPP's \$15,300 penalty.)	(Instead of the ERPP's \$15,300 penalty.)	
Step 4	↓		
	Adjust GPA-generated penalty (Step 4) and recover economic benefit, as appropriate.		
LBP ESA Scenario (All violations are ESA-eligible)			
		<u>GAR Scenario</u> Respondent's GAR is \$301,000 (scenario)	<u>NW Scenario</u> Respondent's Net Worth is \$450,000 (scenario)
Confirm respondent's GPA eligibility.			
↓			
Assess the penalties at \$200 per violation (no ERPP adjustments)			