

**COMMENTS OF
CITIZENS COMMITTEE FOR CHILDREN
COOPER SQUARE COMMITTEE
LEGAL SERVICES NYC
DR. MORRI MARKOWITZ
NEW YORK CITY COALITION TO END LEAD POISONING
NORTHERN MANHATTAN IMPROVEMENT CORPORATION
NYLCV EDUCATION FUND
and TENANTS POLITICAL ACTION COMMITTEE
REGARDING PROPOSED AMENDMENTS TO 28 RCNY CHAPTER 11**

The following organizations jointly submit the following comments in response to the proposed amendments to the rules of the Department of Housing Preservation and Development (HPD) set out in 28 RCNY Chapter 11, that are to be the subject of a hearing on July 29, 2021:

Citizens' Committee for Children of New York (CCC) is a nonprofit child advocacy organization committed to ensuring that every New York child is healthy, housed, educated and safe. Protecting children from lead poisoning aligns directly with CCC's goal of ensuring the healthy development and long-term wellbeing of all children.

The Cooper Square Committee works with area residents to contribute to the preservation and development of affordable, environmentally healthy housing and community/cultural spaces so that the Cooper Square area remains racially, economically and culturally diverse.

Legal Services NYC (LSNYC) is a leading provider of free legal assistance to indigent tenants in New York City. Each year, LSNYC represents thousands of low-income tenants in efforts to enforce health and safety standards in their apartments.

Dr. Morri Markowitz is the Director of the Lead Prevention and Treatment Program at the Montefiore Medical Center. The Program has been providing lead related education and

clinical care for children and pregnant women with lead exposure for more than 50 years. It collaborates with Departments of Health and offers consultations to clinicians worldwide.

The New York City Coalition to End Lead Poisoning (NYCCELP) has advocated since 1985 for the enactment and enforcement of sound policies to prevent lead poisoning of our City's children.

Northern Manhattan Improvement Corporation (NMIC) is a non-profit community-based multi-services organization that provides a range of services to residents of Manhattan and the Bronx. For the past quarter century, NMIC's legal services program has advocated in legislative, administrative, and judicial fora to improve the protections for children from lead poisoning.

NYLCV Education Fund's mission is to educate, engage, and empower New Yorkers to be effective advocates on behalf of the environment. Our work includes educating parents about the need for chemical policy reform that will protect children from exposure to toxic chemicals. Lead poisoning prevention is a focus of NYLCV at the state and city levels.

Tenants Political Action Committee is an all-volunteer organization that works to elect pro-tenant candidates, and defeat pro-landlord candidates

While we commend most of the proposed changes as consistent with the recent amendments to the Administrative Code enacted by Local Law 66 of 2019 (LL66/19), we have concerns with respect to aspects of the proposed rules, which we believe fall short of the City Council's intentions and are less protective of public health.

A major concern is the manner in which the new definition of lead-based paint interfaces with all the paint tests that have been performed thus far over the years (and tests that will be

performed prior to the proposed rule taking effect on Dec 1, 2021). For example, LL66/19 anticipated the situation where an owner previously tested an apartment and – because no surfaces tested at that time were ≥ 1.0 mg/cm² -- was given an exemption by HPD under Admin. Code § 27-2056.5 from the statutory presumption of lead-based paint. That presumption, of course, carries along with it a panoply of mandates under Article 14 of the Housing Maintenance Code, including, inter alia, an owner’s duty to remediate lead hazards (Admin. Code § 27-2056.3), to conduct annual child inquiries and inspections for lead hazards (per Admin. Code § 27056.4), to perform certain permanent abatements of lead-based paint and correction of lead hazards at turnover (Admin. Code § 27-2056.8), and to use of safe work practices when disturbing paint (per Admin. Code § 27-2056.11). For such situations, LL 66/19 added subdivision (c) to § 27-2056.5 which provided that the previous exemption will continue until there is a turnover (vacancy) at the apartment, at which point the exemption ends. In so doing, however, the statute specifically states that HPD “shall establish requirements for the owner ... to notify the department of the turnover of the dwelling unit.” Notwithstanding that mandate, the proposed HPD regulation, at §11-08(f)(1)), rather than “establish requirements” as the statute mandated, merely parrots the statute’s language (“an owner ... must notify the department whenever [such] exempted unit becomes vacant”). We think HPD’s failure to actually “establish requirements” -- i.e., a clear, workable, verifiable, and enforceable mechanism for owners to report such vacancies -- is a recipe for certain non-compliance, with an adverse impact on public health. We have already seen that HPD’s failure to put in place effective mechanisms to enforce compliance with the vacancy abatement requirements of Admin. Code § 27-2056.8 resulted in widespread non-compliance, as demonstrated by the extremely high percentage of audit failures once HPD at long last began to enforce that provision only 2 years ago (some 15

years after its enactment in Local Law 1 of 2004). It is essential that HPD’s proposed regulations do more than parrot the statute in this regard; HPD must come up with a set of specific requirements and enforceable mechanisms for reporting on vacancies in previously exempted apartments.¹

In this connection as well, we have serious concerns about the language pertaining to the presumption of lead in proposed § 11-07(a). The current regulation fully accords with the statute (Admin. Code § 27-2056.5): Paint is presumed to be lead-based paint unless the presumption has been rebutted under the specific procedures set out in the statute and regulations. The proposed rule, however, would alter this definition by adding new language at the end of subdivision “a” to provide that the presumption applies only “if such paint or other similar surface-coating material has not been tested by an x-ray fluorescence analyzer and measured to be negative for lead based paint....” This language, in essence, seems to bypass the process for exempting the property under subdivision “b.” Standing alone, it could be read to mean that so long as an owner has XRF tested and found that the paint is $< 0.5 \text{ mg/cm}^2$ ipso facto the presumption no longer applies – even if the owner has not completed the requirements outlined in subdivision “b” for obtaining an exemption. We would urge that HPD omit this proposed additional language in subdivision “a”, or at least place it within subdivision “b” (which pertains to the mechanisms for rebuttal of the presumption). Otherwise, an argument might be made that an owner who performed the XRF testing required by Local Law 31 of 2020 (LL31/20) (codified at Admin. Code § 27-2056.2(a-1)) could simply tell the tenant the paint is “negative” for lead

¹ HPD, for example, could also consider a data sharing arrangement with the New York State Division of Housing and Community Renewal (which maintains a history of annual registrations of rent stabilized apartments that includes the identity of tenants and vacancies) to identify previously exempted apartments where there has been a subsequent turnover of tenancy.

and claim that the presumption of lead no longer applies (along with all the mandates that follow, as discussed above).

In addition, in enacting LL66/19, the City Council clearly recognized that evolving understandings of the health risks from lead levels previously considered non-hazardous -- by, among other things, legislating an 8-fold reduction in the permissible levels of lead dust on floors (from 40 $\mu\text{g}/\text{ft}^2$ to 5 $\mu\text{g}/\text{ft}^2$) (Admin. Code § 27-2056.2(8)), and a 3-fold reduction in the childhood blood lead levels mandating immediate intervention by the Department of Health and Mental Hygiene (from 15 $\mu\text{g}/\text{dL}$ to 5 $\mu\text{g}/\text{dL}$) (Admin. Code § 17-912). Given that, we think it makes no sense from a public health perspective that HPD's proposed § 11-08(e)(4) would permit exemptions from Article 14 of the Housing Maintenance Code to be granted for 3 months after December 1, 2021, for paint that tested $\geq 0.5 \text{ mg}/\text{cm}^2$ but $< 1.0 \text{ mg}/\text{cm}^2$ – if the test was conducted before December 1. If HPD is informed on, say, December 2, 2021, that there is paint in a dwelling at levels that recently tested at $\geq 0.5 \text{ mg}/\text{cm}^2$, HPD should not proceed to exempt the dwelling from the ambit of Article 14 and leave the young children who reside there at risk – particularly as the owner of such dwelling would henceforth no longer be required to do annual inspections for lead hazards nor use safe work practices when disturbing the paint.

In this light, HPD should also consider requiring owners of previously exempted apartments to affirmatively disclose to tenants any XRF tests that were conducted in the past where the test results were $\geq 0.5 \text{ mg}/\text{cm}^2$ but $< 1.0 \text{ mg}/\text{cm}^2$ – even if the exemption continues to exist until vacancy. This would be consistent with – and further the purposes of – the federal lead disclosure laws (42 USC § 4852d, 24 CFR Part 35 Subpart A, 40 CFR Part 745 Subpart F). Indeed, in a commentary accompanying the issuance of the federal EPA's regulations on lead hazards (at 66 Fed. Reg. 1210), EPA stated that all records "'pertaining to' lead-based paint, lead-

based paint hazards and/or any lead hazard" must be disclosed: "[I]f a seller or lessor has a report showing lead is present in levels that would not constitute a hazard, that report must be disclosed ... even if dust and soil levels are less than the [defined] hazards." (emphasis added) Tenants should at least be on notice where there is paint that – under the revised regulatory definitions – would be considered lead-based paint in New York City.

Dated: July 28, 2021