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2019 Connecticut Transfer Act Amendments-The Legislature's Work Is Never Done

Gov. Ned Lamont recently signed into law Public Act No. 19-75 (P.A. 19-75), making several significant changes to the Connecticut Transfer Act (C.G.S. §§ 22a-134 *et seq.*) (the Transfer Act). The changes address certain concerns of property owners, developers, realtors, lenders and others facing or otherwise involved in potentially lengthy and costly environmental investigations and cleanups when there is the transfer of real property or business operations in Connecticut that meet the definition of an Establishment as that term is defined at C.G.S. Section 22a-134(3) of the Transfer Act.

Background

Enacted in 1985, the Transfer Act has at least two broad goals: provision for the disclosure of environmental conditions prior to the transfer of an Establishment, and creation of a framework and time frame for the post-transfer investigation and cleanup of environmental conditions associated with activities at or of the Establishment. There are and have been actual and perceived unintended or undesirable consequences of the Transfer Act. These consequences have hindered the transfer and, even when there is a transfer, the development or redevelopment of environmentally challenged properties, important to returning these properties to productive reuse. An example of such consequences is the application of the Transfer Act to transactions that, but for the one-time generation of hazardous waste or other nonroutine generation of hazardous waste, would not fall within the definition of a transfer of an Establishment and therefore would not trigger the Transfer Act. Of note, since its enactment in 1985, the Transfer Act has been amended seven times, and there are now 28 exceptions to the definition of a transfer triggering compliance with the Transfer Act. The Transfer Act requires that the owner of a property or a business operation that is an Establishment file with the Connecticut Department of Energy and Environmental Protection (DEEP) when the Establishment undergoes a change in ownership. At or prior to the transfer and in this filing, one of the parties associated with the transaction must certify to the DEEP that they will take on the responsibility for the investigation and, as necessary, cleanup of the Establishment. Until the October 1, 2019 effective date of P.A. 19-75, the Transfer Act defines an Establishment as any real property or business operation (1) at or from which on or after November 19, 1980, there was generated more than 100 kilograms of hazardous waste (roughly the equivalent of half of a 55-gallon drum) in any one month, except when the waste was generated in connection with the remediation of polluted soil, groundwater or sediment, or the removal or abatement of building materials; (2) where hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated or disposed of; or (3) where, on or after May 1, 1967, a furniture stripping operation, dry cleaner or vehicle repair facility existed.

Transfer Act Changes

Definition of an Establishment On June 28, with Lamont's signature, P.A. 19-75 became law. Effective October 1, 2019, Section 1 of this Act amends the definition of an Establishment by providing additional exclusions for properties and business operations that otherwise would have an obligation to comply with the Transfer Act in the event of a covered transfer. By operation of P.A. 19-75, a real property or business operation that generated more than one hundred kilograms of hazardous waste in any one month since November 19, 1980, will no longer be an Establishment where this generation was solely as result of either

- the one-time generation of hazardous waste in any one month, where this generation was a result of either the property or business operation's first-time generation of hazardous waste or this one-time generation took place after the last time an owner of the property or business operation was required to submit a Transfer Act form; or
- one or more of the following:

    *The removal or abatement of building materials or the removal of materials used for maintaining or operating a building;

    *The remediation of polluted soil, groundwater or sediment;

    *The removal of unused chemicals or materials as a result of the emptying or clearing out of a building, where the removal is supported by facts reasonably established at the time of such removal; or

    *The complete cessation of a business operation, where the hazardous waste is removed no later than 90 days after this cessation and the cessation is supported by facts reasonably established at the time of the cessation.

Audit Time Frame Another important change to the Transfer Act under P.A. 19-75 is the significant shortening of the time frame for the DEEP's commencement of an audit following the filing with the DEEP of the Licensed Environmental Professional's final verification that the Establishment has been fully investigated and remediated (Verification). For Verifications filed on or after October 1, 2019, Section 2 of P.A. 19-75 shortens from three years to one year the time frame for the DEEP to commence an audit of a Verification. P.A. 19-75 also clarifies that any DEEP audit commenced either within three years of the filing of a Verification prior to October 1, 2019, or within one year of the filing of a Verification on or after October 1, 2019, needs to be completed by the DEEP within three years of the filing of the Verification. The DEEP can extend the period for completion of an audit when the DEEP has requested and is awaiting additional information. The Transfer Act also provides limited circumstances under which the outside time frame for the DEEP's commencement of an audit will be extended, e.g., where a Verification relies on the use of materially inaccurate, erroneous or misleading information; post-Verification monitoring has not been completed or a required environmental land use restriction has not been recorded; or the DEEP concludes, even with the completion of remediation, that there is a substantial threat to public health or the environment.

The Transfer Act Working Group

Leading up to the passage of P.A. 19-75, there were proposals and discussions of additional revisions to the Transfer Act that are not addressed in Sections 1 and 2 of P.A. 19-75. In Section 3 of P.A. 19-75, which became effective upon passage, the Legislature provides for the convening by the chairpersons of the Connecticut General Assembly Commerce and Environment Committees of a Transfer Act working group to examine and develop recommendations regarding further legislative changes to the Transfer Act. P.A. 19-75 requires that the Transfer Act working group meet at least monthly and, on or before February 1, 2020, submit to the Commerce and Environment Committees its report of its findings and recommendations for further legislative changes to the Transfer Act. The Transfer Act working group will terminate upon its submittal of the report or February 1, 2020, whichever is later.

Looking Ahead

P.A. 19-75 is the latest legislative development in the effort of multiple constituencies to find or, as importantly, ensure in practice the proper balance between environmental disclosure with a mechanism to identify and address environmental conditions on the one hand, and regulatory certainty, predictability and priorities with benefit to both the economy and the environment on the other. With four months of the 2019 Transfer Act revisions behind them, next session's Legislature may very well pass additional legislative changes, including changes that will be among those recommended to the Commerce and Environment Committees by the Transfer Act working group. Should you have any questions regarding the above, please feel free to contact any of the attorneys listed in the sidebar.

Authors



Elizabeth C. Barton
Of Counsel

Hartford, CT | (860) 275-0371

ecbarton@daypitney.com



Harold M. Blinderman
Partner

Hartford, CT | (860) 275-0357

hmblinderman@daypitney.com