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2020 Transfer Act Revisions and Connecticut's Transition to a Release-Based Remediation Program - An Extended Goodbye to the Transfer Act

On October 2, after the recently concluded Special Session of the Connecticut General Assembly, Gov. Ned Lamont signed House Bill No. 7001, "An Act Revising Provisions of the Transfer Act and Authorizing the Development and Implementation of a Release-Based Remediation Program" (the Public Act). Effective immediately, the Public Act adopts important changes to the Connecticut Transfer Act (C.G.S. §§ 22a-134 et seq.) (the Transfer Act) and also provisions for an eventual transition from remediation under the Transfer Act to a new release-based reporting and remediation program in Connecticut.

Background

Connecticut is one of only two states where environmental investigation and remediation are statutorily triggered by a sale or other transfer of property or operations meeting the definition of an "establishment" under the Transfer Act. Determining whether the Transfer Act applies does not depend on whether there has been a release but rather on the volume of hazardous waste generated and whether activities before the transfer included dry cleaning operations, furniture stripping or vehicle body repair. The General Assembly has amended the Transfer Act multiple times since its enactment in 1985. These amendments have resulted in the 29 exclusions or exceptions to the definition of a "transfer of an establishment" subject to the Transfer Act.

As we reported in a prior alert, Public Act No. 19-75 adopted revisions to the Transfer Act and created a legislative working group charged with recommending additional Transfer Act changes to the legislature. The Transfer Act Working Group Report to the legislature proposed consensus amendments to the definitions of an "establishment" and a "transfer of an establishment" under the Transfer Act. These consensus amendments are in the Public Act.

2020 Transfer Act Revisions

Sections 1 through 14 of the Public Act set forth revisions to the Transfer Act and are effective as of October 2, 2020.

Definition of a Transfer of an Establishment

The Public Act consolidates, clarifies and eliminates a number of the 29 exclusions from the "transfer of an establishment" definition in the Transfer Act. The revisions include (1) the exclusion of the transfer of a unit in a residential common-interest community, (2) the exclusion of transfers of ownership interests of 50 percent or less, (3) the transfer to and from municipalities using specified mechanisms, and (4) a name change for a limited liability company (LLC). In connection with the clarification of the exclusion for transfers of residential units, the Public Act revises statutory provisions setting forth the obligations of the common-interest community's declarant.

Definition of an Establishment

The Public Act further revises the "establishment" definition, the prerequisite for the triggering of the Transfer Act. The amendments clarify that "universal waste" is excluded from the definition of "hazardous waste" when determining Transfer Act applicability. And for industrial/commercial condominium properties and multitenant properties, the Public Act defines the extent of the regulated area requiring investigation and, as necessary, remediation to comply with the Transfer Act by

reference to the footprint of the industrial/commercial unit or the areal extent of the space leased by the establishment along with any other areas within the common-interest community or the multitenant space used by the establishment as part of its operations. The Public Act further clarifies the point at which a transfer of a property will no longer trigger the need to comply with the Transfer Act.

The Release-Based Reporting and Remediation Program

General Requirements and Applicability

Sections 15 through 23 of the Public Act provide a broad framework for the planned transitioning from remediation under the Transfer Act program to a release-based reporting and remediation program. The new program will be triggered when there is the discovery of a release. However, these sections are not effective until DEEP adopts, amends and/or repeals regulations as necessary for the purposes of Sections 15 through 23. Once the release-based program is in effect, any person who creates or maintains a covered release at any commercial, industrial or residential property will be required to report and then remediate the reported release in accordance with the regulations to be promulgated.

Certain definitions in these sections of the Public Act require further clarification, are inconsistent with definitions of the same terms elsewhere in Connecticut's environmental statutes and/or will expand potential liability. For example, the definition of "person" is broad, encompassing individuals, business entities, the federal government and the state and instrumentalities or subdivisions thereof, as well as any officer or governing or managing body of any partnership, association, firm or corporation, or any member or manager of a limited liability company. House Amendment A to House Bill No. 7001, passed by the legislature and signed into law by the governor, limits the scope of the definition to an officer and the governing or managing body of a firm, partnership, association or corporation, or an LLC member or manager, in a position of responsibility to influence corporate policies or activities, when there is a nexus between the action or inactions and a violation of Sections 16 through 22, and when "the actions or inactions of the officer, body, member or manager facilitated" the violation.

Section 18 addresses DEEP's enforcement of the release-based reporting and remediation requirements, providing for, among other things, the issuance of cease and desist orders and the assessment of civil penalties. In addition, the Public Act allows for recovery by DEEP or by any other person of costs incurred to contain, remove or mitigate the effects of a release from any person who fails to comply with Sections 17 and 19.

Excluded Releases

At various points in Sections 16 through 22, certain categories of releases are excluded from the release-based reporting and remediation requirements. These exclusions include:

- Historic releases where the only evidence of the release is data available or generated prior to the adoption of the regulations for the release-based program.
- Certain releases being investigated and remediated under the Transfer Act.
- Releases occurring after the filing of a Form III or IV under the Transfer Act but before the completion of a Phase II investigation.
- Certain releases at a property being remediated under an existing Connecticut brownfield program.
- Releases, if any, DEEP might exclude from all or part of the statutory requirements in the yet to be adopted regulations.

Liability Protections

The Public Act provides certain liability protection for persons who did not create a release but properly report and clean up the release. This protection will be unavailable to a property owner if, for example, the owner fails to comply with EURs or variance requirements.

Section 22 of the Public Act provides that except with respect to the innocent landowner defense, nothing in the Public Act "shall be construed to infringe upon or otherwise limit any liability limitations or protections" pursuant to other Connecticut

statutes. Within Sections 15 through 22, there are references to protections afforded because of, for example, state brownfield programs and covenants not to sue.

DEEP Regulations and Convening of a Working Group

The Public Act identifies some of the components of the regulations to be adopted by DEEP. DEEP is directed to establish tiers of releases, taking into consideration the significance, extent and potential risk of the release. The regulations will also address applicable fees and DEEP's auditing of release response activities.

Section 19(b) directs DEEP, in conjunction with the Department of Economic and Community Development, to convene a working group to provide advice and feedback on the regulations to be adopted by DEEP. This working group is to meet monthly until the regulations are adopted.

Looking Ahead

Intended goals of the transitioning from remediation under the Transfer Act program to a new release-based reporting and remediation program include the continued protection of human health and the environment; the alignment of Connecticut statutory cleanup provisions with those of other states; and benefit to the Connecticut economy as a result of increases in property transfers, property development and redevelopment, and potential expansion of existing businesses. DEEP indicates that with the new release-based reporting and remediation program, which will rely significantly on Connecticut's Licensed Environmental Professionals, DEEP will be able to better focus its limited resources on contaminated sites posing the greatest risk. Many critical details are yet to come. The potential impact of the unavoidable uncertainty and unpredictability, at least in the short term, is not clear. But in the interim, the consensus revisions to the Transfer Act in Sections 1 through 14 are available when determining the applicability of the Transfer Act to transfers of ownership interests.

If 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