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Transfer Act Changes and Plans for New Release-Based Program -- Unfinished Business Remains

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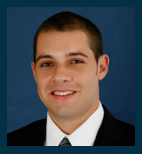
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The Transfer Act is broken and often a hurdle to investment, redevelopment and even the cleanup of contaminated sites in Connecticut. Thankfully, the recently passed **amendments to the Transfer Act** include a number of long-needed fixes. However, these changes, while helpful, do not immediately address the fundamental problems with the Transfer Act. To do that, the bill also includes the framework for a tiered release-based program to eventually replace the Transfer Act, i.e., one based on an actual spill rather than the "establishment" status of the site. Conceptually, the shift to a release-based program is welcome and long overdue, but the amendments in this area reflect a "ready, shoot, aim" approach and haven't been fully vetted with, nor gained broad-based acceptance by, the regulated community; therefore, the devil will truly be in the details for the rollout. There is much work to do and it will require significant involvement and investment from real estate, legal and technical stakeholders with good peripheral vision and experience in other states with release-based programs. The ultimate success of a replacement to the Transfer Act will also be contingent upon effective integration of such changes with other aspects of the Department of Energy & Environmental Protection's (DEEP) evolving regulatory programs and proper agency staffing/budget.

During the September special legislative session, the Connecticut General Assembly quickly and unanimously passed a bill addressing one of the state's most onerous (and notorious) environmental laws, the Connecticut Transfer Act, C.G.S. §§ 22a-134 et seq. The legislation (HB 7001) has two parts: (1) strategic amendments to the existing Transfer Act language intended to make certain improvements immediately; and (2) an outline of a release-based program intended to replace the Transfer Act at some date in the future after the DEEP designs the program, drafts regulations and gets them approved by the General Assembly.

While (or maybe because) we have lived with the Transfer Act for 35 years, most stakeholders will be happy to see it go. We affectionately refer to the Transfer Act as "Hotel California" because "you can try and check out any time you like, but you can never leave" . . . or it takes a really long time and costs a lot of money. As a result, there is a surface appeal to anything that is touted as a "fix" or replacement to the Transfer Act. On the other hand, embracing a release-based program will move Connecticut to a remedial program more aligned with the rest of the country (only New Jersey has a similar property transfer program) and should spark redevelopment if properly implemented and staffed, but the new legislation leaves a lot of work to be done before we can get to that point.

Transfer Act - Strategic Changes

The amendments make several interim, practical and long-awaited improvements to the existing Transfer Act while the release-based program is being designed. These changes were largely the result of a yearlong working group of technical and legal practitioners and were well vetted in the stakeholder community. In particular, among others, the new changes:

- limit the investigation required at certain properties with multiple tenants (e.g., strip malls with a dry cleaner);
- broaden an exception to the Transfer Act for transfers of stock, securities, or other ownership interests by increasing, from more than 40 percent to more than 50 percent, the percentage of ownership interests that must be transferred before triggering the Transfer Act;
- specifically exclude from the definition of a "transfer of establishment" a change of an LLC's name;
- provide exceptions and less onerous obligations with respect to certain transfers of residential, commercial and industrial units in common interest communities;
- merge and consolidate various exceptions related to properties already enrolled in other DEEP brownfield programs; and
- clarify the exclusion for a transfer of title from bankruptcy court.

Taken together, these changes will reduce the number of real property (and business) transactions captured by the Transfer Act liability "net" and create a more predictable path for owners and developers to buy, sell and improve (and lenders to lend on) sites in Connecticut. Sites that do not benefit from the amendments noted above will remain subject to the Transfer Act and will have to wait for the new release-based program to be fully implemented if they want to avoid it.

Transition from Transfer-based Program to Release-based Program

The proposed release-based program will be a fundamental change in how, and when, properties are identified as environmentally impaired. As the names suggest, the Transfer Act is a transfer-based program -- that is, the transfer of the site (or business) is the trigger if the site (or business) has the status of being an "Establishment" (due to, for example, a dry cleaner, furniture stripper or vehicle body repair facility having operated onsite, or more than 100 kilograms of hazardous waste having been generated onsite in any one month since November 19, 1980), regardless of whether there has been a spill or release. In contrast, a release-based program is only triggered if there is an actual release or spill, regardless of when or whether the site is transferred.

The difference is simple but the implications are significant. For example, under the Transfer Act, in connection with any "transfer of establishment": (i) the seller must be able to show that the property (or business) that is deemed an establishment has not had any release or spill on it (i.e., by "proving the negative") or that any spills and releases have been cleaned up; or (ii) the buyer and seller must decide in advance of a transaction who will be responsible for the post-closing investigation and any remediation required. Some have the misbelief that because a property is in the Transfer Act, it is "dirty." In reality, there are a lot of clean sites in the Transfer Act program because of their "establishment" status, and conversely, there are a lot of "dirty" sites that are not in the Transfer Act, either because they are not

"establishments" and/or because they have not been transferred. Thus, the Transfer Act casts a broad net. In the end, not all the sites captured are environmentally impaired but the time and cost of proving they are clean is often enough to cause a buyer (or a buyer's bank or investor) to avoid or kill a deal (or a seller to mothball a property to avoid the Transfer Act).

While a release-based program could and should be an improvement that will align Connecticut's practices with other states, the amendments, as passed, are not a magic bullet but rather a work in progress that have not yet been well vetted with the stakeholder community. Rather, the amendments provide a framework for the to-be-developed program, which will include the following components:

- separate "tiers" of releases based on risk;
- reporting requirements, including threshold reportable quantities and concentrations;
- remediation procedures and deadlines, including public participation;
- remediation standards;
- verification and DEEP audits;
- a broad definition of regulated "persons," including LLCs and their members and managers; and
- supervision requirements, including the use of licensed environmental professionals (LEPs), for certain releases without DEEP supervision.

Working Group

Although a move in the right direction, the devil will be in the details (i.e., the implementing regulations). Ultimately, to develop a program that not only provides the necessary and appropriate environmental protections but also accounts for practical economic and business realities, there must be input from a diverse group of stakeholders with technical and legal expertise, including those with good peripheral vision and experience with other active analogous state programs. To that end, the amendments establish a working group co-chaired by the commissioners of the DEEP and the Department of Economic and Community Development that will also include chairpersons and ranking members of the Environment and Commerce Committees, transactional environmental attorneys, commercial real estate brokers and others. The working group will meet monthly until the regulations are adopted (a process that will undoubtedly take well over a year).

Staffing Is Essential

DEEP will also need to convince the General Assembly to adequately fund the new program to ensure sufficient, well-trained staff. No matter how good the intentions and design of the program, it cannot succeed if DEEP does not have the resources to interact with the regulated community and timely process release notifications to close out sites. For a sense of scale, it is worth noting that according to the MassDEP annual program reports, more than 47,000 releases have been reported in Massachusetts since 1984, including ~1,300 notifications in 2019. The Massachusetts program has closed ~34,000 sites since 1993, including ~1,100 in 2019. By comparison, only ~4,000 sites have entered the Transfer Act in Connecticut since 1985 and, of those, only ~1,000 have been cleaned up and closed out. Without proper staffing, even a well-designed program could quickly overwhelm an understaffed and under budgeted DEEP.

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Integration

No matter what, it will be critical to integrate the changes to the Transfer Act and development of a release-based program with other aspects of DEEP's regulatory program, including, the "Wave 2" Remediation Standard Regulation revisions, environmental use restriction regulations and spill regulations, which are all in various stages of development.

Finally, even if everyone agrees the Transfer Act should be replaced, implementing a release-based program will still present many significant challenges and decisions that will need to be addressed by the working group. By way of example, in 1994, DEEP proposed regulations to implement the state's spill reporting statute (C.G.S. § 22a-450). While most stakeholders at the time agreed that the proposed regulations contained many workable provisions, they were split on how the regulations should address historic spills or releases. One provision imposed reporting obligations for the discovery of historic spills that tremendously troubled the regulated community, as it likely would have halted many commercial real estate transactions. Rather than simply tabling that controversial provision for a future discussion and pursuing the other welcome regulatory provisions, DEEP "threw the baby out with the bath water" and never finalized any of the spill reporting regulations. (26 years later, the State still does not have final spill regulations.) We do not want the same mistake to repeat itself here. DEEP, the working group to be established and all other relevant stakeholders will need to come together and work cooperatively in order to develop a program that appropriately protects human health and the environment but also embraces the realities of the business community and our state's economy.

This is a great opportunity to align Connecticut's remedial program with programs used in most other states while still protecting our environment and encouraging the cleanup and reuse of contaminated sites. But let's not kid ourselves -- there is still very important and difficult work to be done before we can wave goodbye to "Hotel California" and start enjoying "Life in the Fast Lane." Buckle up!

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