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ResearchReport

2019-2020 Changes to the Transfer Act

By: Terry Adams, Principal Analyst
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Issue

Summarize changes to the Transfer Act made by the legislature in 2019 and 2020.

Summary

The state's Transfer Act requires the disclosure of environmental conditions when certain properties or businesses, referred to as "establishments," are transferred (i.e., change in ownership). It generally applies to properties on which, or a business operation from which, (1) hazardous waste was generated or processed or (2) a dry cleaning, furniture stripping, or vehicle body repair business operated. The law sets out several specific exemptions from its requirements (CGS § 22a-134 *et seq.*).

Depending on the property involved, the Transfer Act may require investigation; monitoring; or remediation in compliance with the state's clean-up standards, known as the Remediation Standard Regulations (RSRs) (Conn. Agencies Regs., §§ 22a-133k-1 to -3). When an establishment is transferred, one of four forms must be filed with the Department of Energy and Environmental Protection (DEEP) (i.e., Forms I, II, III, or IV), and the person signing the form's certification is responsible for the property's conditions. The type of form that must be filed depends on the environmental condition and investigation, if any, of the property.

In 2019 and 2020, the legislature made numerous changes to the Transfer Act. In 2019 (PA 19-75), the legislature excluded certain property and businesses from the Transfer Act by narrowing the types of hazardous waste that count towards the 100 kilogram threshold that triggers the law's application. The act also (1) shortened, from three years to one year, the window for commencing audits of Transfer Act final verifications received on or after October 1, 2019, and (2) required

DEEP to complete these audits within three years after receiving the final verification. As under existing law, both deadlines may be extended under certain conditions. Lastly, PA 19-75 required the Commerce and Environment committee chairpersons to convene a working group to examine the Transfer Act and recommend any legislative changes to it in advance of the 2020 session.

During the 2020 September special session, the legislature enacted numerous changes to the Transfer Act while also establishing a process to transition the state from its transfer-based approach to property remediation to a release-based approach (PA 20-9, September Special Session (SSS)). (The legislature considered two bills related to the Transfer Act during the 2020 regular session (SBs 281 and 293), but it did not act on either bill before the session ended due to the COVID-19 pandemic.)

With respect to the Transfer Act, PA 20-9, SSS, principally (1) eliminated or modified several exemptions to the definition of "transfer of establishment" and (2) limited the circumstances under which certain parcels are deemed to be establishments. It also exempted conveyances of units in residential common interest communities from the definition of "transfer of establishment" and instead required declarants (i.e., developers) to take certain actions before conveying units in communities that are establishments.

2019 Changes

Definition of Establishment

Before PA 19-75, establishments included real property and business operations from which more than 100 kilograms (about 220 pounds) of hazardous waste was generated in any one month after November 18, 1980, except waste generated from (1) remediating polluted soil, groundwater, or sediment or (2) removing or abating building materials.

PA 19-75 narrowed the definition of "establishment" by additionally excluding property and businesses where this amount of waste was generated solely (1) one time in any one month, either for the first time or since the last time a Transfer Act form (I, II, III, or IV) had to be submitted or (2) by removing one or more of the following:

1. building maintenance or operating materials;
2. unused chemicals or materials from emptying or clearing out a building, as long as the removal is supported by facts reasonably established at the time of the removal; and
3. waste within 90 days of a business ceasing operations, as long as the cessation is supported by facts reasonably established at the time of the cessation.

Audits

Before PA 19-75, the DEEP commissioner could audit a final verification for an entire establishment (i.e., a written opinion by a licensed environmental professional (LEP) stating that an establishment was remediated according to specific standards) within three years after the verification's submission. For verifications submitted on or after October 1, 2019, PA 19-75 (1) shortened, from three years to one year, the period of time after the verification's submission during which DEEP may begin an audit and (2) required the commissioner to complete these audits within three years after receiving the final verification, except as described below.

The act made a conforming change to a provision allowing the DEEP commissioner to audit a final verification after the audit window under certain conditions. Under the act, if these conditions exist, the commissioner (1) may begin an audit more than one year after receiving the final verification and (2) need not complete the audit within three years after receiving the final verification.

As under existing law, the conditions include the commissioner determining the following:

1. the verification was based on materially inaccurate, erroneous, or misleading information or that misrepresentations were made when the verification was submitted;
2. required monitoring, operations, or maintenance has not been done; or
3. information exists showing that the remediation may not prevent a substantial threat to public health or the environment.

2020 Changes

Introduction

The working group established by PA 19-75 met throughout the 2019 interim and submitted its report to the Commerce and Environment committees in February 2020. It had two subcommittees. The "establishment" subcommittee was tasked with addressing various concerns about the types of properties and businesses within the establishment definition and, therefore, subject to the Transfer Act, particularly with respect to multitenant properties. The "transfer" subcommittee's task was to review the exceptions to the Transfer Act enumerated under the law's definition of a "transfer of establishment."

The subcommittees' recommendations (see pp. 6-9 of the above report) are largely reflected in sections 1-5 of PA 20-9, SSS. Principally, these sections (1) eliminated or modified several exemptions to the definition of "transfer of establishment" and (2) limited the circumstances under which certain parcels are deemed to be establishments. They also exempted conveyances of units

in residential common interest communities from the definition of "transfer of establishment" and instead required declarants (i.e., developers) to take certain actions before conveying units in communities that are establishments.

In addition to the working group's recommendations, the act replaced several references to "environmental land use restrictions" (ELURs) with references to "environmental use restrictions" (EURs), to conform to pending revisions to DEEP regulations that were approved in February 2021. It also made minor changes to Form IV's required contents to conform to DEEP regulations (§§ 1-2 & 10-14).

Lastly, as described below, the act established a process to transition the state from its transfer-based approach to property remediation to a release-based approach (§§ 15-23).

Transfer of Establishment (§ 1)

By law, "transfer of establishment" generally means any transaction or proceeding that changes an establishment's ownership but excludes more than two dozen specified circumstances (e.g., an ownership change approved by the Probate Court). PA 20-9, SSS, eliminated or modified several of these exemptions and created a new one. Below we highlight a selection of these changes.

Transfer of Ownership. Under prior law, "transfer of establishment" excluded transfers of stock, securities, or other ownership interests representing less than 40% of the ownership of the entity owning or operating the establishment. The act increased this threshold to 50% or less.

Universal Waste. The act eliminated an exemption for universal waste and replaced it by creating a similar exemption to the definition of "establishment" (see below). By law, "universal waste" includes batteries, pesticides, thermostats, lamps, and used electronics regulated as a universal waste under DEEP regulations.

Brownfields. Under prior law, "transfer of establishment" had three separate exemptions for brownfields. The act consolidated them into one exemption.

LLC Name Change. The act excluded from "transfer of establishment" the change of an LLC's name by filing an amendment to the company's certificate of organization.

Definition of Establishment (§§ 1 & 2)

By law, "establishment" generally means real property on which, or a business operation from which, (1) more than 100 kilograms (about 220 pounds) of hazardous waste was generated or

processed in any one month on or after November 19, 1980; or (2) a dry cleaning, furniture stripping, or vehicle body repair business operated.

Existing law has exceptions to the above definition (e.g., waste generated from removing or abating building materials). PA 20-9, SSS, added an exception for universal waste, which replaced a similar one in prior law from the definition of "transfer of establishment."

The act also established specific requirements for determining what parts of certain multi-tenant properties, or properties occupied by the owner and a tenant, are considered establishments. Additionally, it specified certain conditions under which parcels are no longer considered establishments.

Universal Waste. Prior law excluded universal waste from the definition of "transfer of establishment." PA 20-9, SSS, eliminated this exclusion and replaced it with a similar exception to the definition of "establishment." The primary difference is that under prior law, a parcel qualifying for the universal waste exception was still an establishment, but the conveyance of it did not need to comply with the Transfer Act. Under the act, the parcel is not an establishment to begin with.

As under prior law, the universal waste exemption, with certain exceptions, applies to real property or a business operation that qualifies as an establishment solely from (1) generating more than 100 kilograms of universal waste in a calendar month; (2) storing, handling, or transporting universal waste generated at a different location; or (3) activities at a universal waste transfer facility. The exemption does not apply if (1) the property or business otherwise qualifies as an establishment; (2) there was universal waste contamination at or from the property or business; or (3) the waste was not properly recycled, treated, or disposed of at the property or business.

Multi-Tenant and Certain Owner-Occupied Properties. Under PA 20-9, SSS, if a property or business operation is an establishment, then for purposes of filing Forms I-IV after October 1, 2020, the establishment includes the entire parcel or parcels on which the establishment is located, except as described below.

The act created an exception for determining what parts of certain multi-tenant properties, or properties occupied by both the owner and a tenant, are considered establishments. It subjected these properties to the specific requirements shown in Table 1 below.

Table 1: Multi-Tenant and Certain Owner-Occupied Properties

Property Description	*Part Deemed an Establishment Under PA 20-9, SSS*
Leased or previously leased to two or more tenants	Area on which the business operation is or was located, including (1) the entire part leased to the business operation and (2) any other area of the property used or occupied by the business operation
Occupied or was occupied simultaneously by the owner and a tenant	Same as above
Commercial or industrial unit in a common interest community	The unit, limited common elements under exclusive use of the unit owner on which the establishment is or was operated, and any part of the common area used or occupied by the unit owner

The act also specified that for business operations that are establishments, the establishment includes the (1) real property on which the business operation is or was located and (2) entire part of the property the business used or occupied.

Parcels no Longer Considered Establishments. Under prior law, an establishment transfer did not need to comply with the Transfer Act if certain conditions existed. Generally, these were (1) completing any necessary remediation, (2) DEEP approving the remediation or an LEP verifying it, and (3) no subsequent activities occurring that meet the criteria for being deemed an "establishment."

PA 20-9, SSS, instead deemed these properties to no longer be establishments if, in addition to the above requirements, (1) the deadline for DEEP to audit an LEP verification passed without the commissioner requiring further action or (2) DEEP issued a no-audit letter or successful audit closure letter.

Common Interest Communities (§§ 1 & 3-5)

Conveyance of Residential Unit (§§ 1 & 3). Prior law excluded the conveyance of a unit in a residential common interest community from the definition of "transfer of establishment" under certain conditions (e.g., the declarant was a certifying party for remediation purposes).

PA 20-9, SSS, made the exclusion unconditional and instead required the declarant, or the declarant's immediate predecessor in title, to take the following actions before conveying a unit in a residential common interest community that is an establishment:

1. become a certifying party for purposes of investigating and remediating the parcel on which the community is located,
2. provide the financial assurance described below, and
3. record notice in the municipal land records that the parcel is being investigated and remediated according to the Transfer Act's requirements.

The notice must identify the volume and page number of any recorded EUR. If the declarant does not record the notice, then the DEEP commissioner may record it or require an individual or entity authorized to act on behalf of the community to do so.

Under the act, the financial assurance must (1) identify the DEEP commissioner as the beneficiary, (2) be in an amount and form approved by the commissioner, and (3) equal the cost of investigating and remediating the subject property to the Transfer Act's standards. The assurance must be used solely at the affected community to investigate and remediate the property for the unit owners' benefit. Prior law had similar financial assurance requirements.

Public Offering Statements (§§ 3 & 5). Under prior law, each time a seller conveyed to a purchaser a unit in a common interest community that is an establishment, the seller had to give notice to the purchaser summarizing (1) the status of the community's environmental condition, (2) any investigation or remediation activities, and (3) any resulting EURs.

PA 20-9, SSS, instead required that this notice be included in the public offering statement for residential common interest communities determined to be establishments as defined in the Transfer Act. (By law, a declarant must prepare a public offering statement before offering the public any interest in a unit.)

Notice to Purchaser (§ 4). Under existing law, before conveying or transferring the right to possess a unit in a common interest community, a unit owner generally must give a purchaser or the purchaser's attorney a certificate containing various statements. The act additionally requires that the statements include a (1) copy of any land records notice (as described above) and (2) statement with the volume and page number from the applicable municipal land records of any EUR encumbering the parcel or any portion of the parcel on which the community is located.

Transition to Release-Based Approach

PA 20-9, SSS (§§ 15-23), established a process to transition the state from its transfer-based approach to property remediation to a release-based approach. The release-based approach becomes effective when the DEEP commissioner adopts regulations required by the act. The act generally applies the release-based system to releases (e.g., spills) created or maintained once these regulations are adopted. Properties subject to the Transfer Act on or before this date generally remain subject to it until they fulfill its requirements.

Under PA 20-9, SSS, the DEEP commissioner must adopt regulations for reporting and remediating releases of oil, petroleum, chemical liquids or solids, liquid or gaseous products, or hazardous waste to the land or waters of the state. The regulations must include provisions about remediation supervision, verification, auditing, and any required fees. They must also provide tiers of releases, based on risk, that assign the required level of supervision and verification for each tier.

The act established a working group to provide advice and feedback about the regulations. The group met throughout 2021 and also formed several topical subcommittees. The group and the subcommittees will continue their work in 2022. As of this writing, the group has not indicated when it will release proposed regulations.

Please refer to OLR's public act summary for more information about the act's requirements for the release-based approach.

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