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CERCLA Liability and Protections for Commercial Tenants

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Background

CERCLA provides that the owner and operator of a property may be liable for all cleanup costs for any release(s) of hazardous substances at the property. In most circumstances, a commercial tenant fits CERCLA's definition of an operator (and, in certain cases, an owner) and is therefore potentially liable for contamination. Owners can qualify for a defense to liability called the Bona Fide Prospective Purchaser ("BFPP") defense by: (a) conducting what CERCLA calls All Appropriate Inquiry (which includes a Phase I Environmental Site Assessment that complies with the ASTM 1527-13 standard); and, (b) complying with a series of ongoing obligations. Those ongoing obligations include compliance with reporting requirements for any known releases at the property.

Tenants may qualify for BFPP status in two ways: derivatively, by virtue of the landlord's BFPP status, or independently. Both require carefully crafted lease provisions. Tenants who purchase property they formerly leased may also qualify for BFPP status under certain circumstances.

Derivative BFPP Protection

A tenant will qualify for BFPP status derivatively only as long as the landlord initially qualifies and maintains its status as a BFPP throughout the lease term. This puts the onus on the tenant to determine whether the landlord qualifies as a BFPP. In general, when negotiating the lease agreement, both the landlord and tenant should consider including representations and warranties provisions allowing for up-front investigation of the property's condition, requiring ongoing communication about reportable releases or potential releases and indemnification provisions – all specifically addressing BFPP compliance.

Direct BFPP Protection

A tenant may qualify for BFPP status independently if the tenant conducts All Appropriate Inquiry before entering into the lease agreement and if it complies with certain ongoing obligations. To do that, however, requires that the landlord give the tenant permission to conduct a site inspection and undertake other due diligence at the property and to potentially notify the appropriate agencies if a reportable release is discovered.

Lease provisions that will help ensure a tenant can qualify as a BFPP independently (in addition to those identified above) include access provisions permitting the tenant to conduct a Phase I Environmental Site Assessment and other necessary site investigations at the property; provisions allowing the tenant to notify regulatory agencies of reportable

releases discovered as a result of due diligence or during the tenancy as required to meet ongoing obligations under CERCLA's BFPP provisions; and a release from any liability for expenses or other damage that the landlord may incur as a result.

BFPP Protection for Tenants Seeking to Purchase Leased Property

When a tenant seeks to purchase property it already leases, questions may arise regarding potential affiliations between the landlord and tenant. Generally, BFPP protection is unavailable to a party who is “affiliated with” another party who is potentially responsible for contamination, whether through a family, corporate, financial or contractual relationship. A potentially liable party cannot avoid cleanup obligations simply by transferring the property to another connected entity.

Guidance issued by the Environmental Protection Agency suggests that, under certain circumstances, there is an exception to this rule for a tenant who purchases leased property from its landlord. A tenant who seeks to purchase the property it is leasing may qualify for BFPP status once it acquires the property, notwithstanding its connection with the landlord. Generally, if a tenant is potentially liable for the contamination, the tenant will not be treated as a BFPP. If neither the tenant nor the owner are a potentially responsible party (“PRP”) under CERCLA, the tenant may qualify as a BFPP. If the owner is a PRP, the tenant's status as a BFPP will depend on the actions of and relationship between the landlord and tenant.

Conclusion

Maintaining BFPP protection may require ongoing notification and other mutual obligations between landlord and tenant throughout the lease term. The best way to structure a lease agreement to help ensure that occurs will vary for individual scenarios and properties. If a tenant is considering purchasing a property it leases, it is important for the tenant to understand its own status and the owner's status as PRPs and it may be advisable to begin conversations with the appropriate agencies prior to acquiring a leased property to determine potential liabilities and protections.