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## EPA Sheds Light on Availability to Tenant of Bona Fide Prospective Purchaser Defense to Avoid CERCLA Liability

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, tenants—as well as landlords—may be considered present or past owners or operators of contaminated properties, and thus liable as "potentially responsible parties" (PRPs) for the substantial costs of investigating and remediating contamination, regardless of fault. Recently, the Environmental Protection Agency (EPA) issued guidance regarding the availability of a particular CERCLA defense to tenants. Although there are other arguments and defenses against liability, prospective tenants may wish to consider the protections afforded by this defense and the steps necessary to take advantage of it.

In 2002 the Small Business Liability and Brownfields Revitalization Act (Brownfields Amendment) created a defense for a person or that person's tenant that acquires a subject facility after January 11, 2002, and satisfies the requirements of a "bona fide prospective purchaser" (BFPP), primarily, to conduct "all appropriate inquiry" and satisfy specified continuing obligations. While the Brownfields Amendment contemplated that the BFPP defense would apply to tenants, the extent to which tenants could take advantage of this protection remained unclear. On January 14, 2009, the EPA released a memorandum providing guidance on how it plans to exercise its enforcement discretion when applying the BFPP protection to tenants.

According to the January Guidance, the EPA intends to use its enforcement discretion on a site-specific basis as follows:

- Tenants with Indicia of Ownership. Tenants will be considered *de facto* owners of a site if they are parties to a lease that provides sufficient "indicia of ownership," such as a ground lease. The EPA does not intend to pursue these tenants if they independently satisfy the BFPP requirements.
- Tenants with "Derivative" BFPP Status. Tenants not considered *de facto* owners may derive BFPP status and protection from a landlord-owner who satisfies the BFPP requirements. To be eligible for BFPP protection, these tenants must not dispose of hazardous materials at the site or impede the performance of a response action or natural resource restoration. Note that these tenants are not required to carry out additional BFPP responsibilities, but if the owner loses BFPP status for any reason, the tenant will generally lose it as well. Even so, the EPA may decide not to pursue action against the tenant if the owner's loss of BFPP status was not the tenant's fault. Further, the EPA may extend BFPP protection to a tenant despite its landlord's failure to satisfy continuing obligations if, in light of all surrounding circumstances, the tenant reasonably and appropriately satisfies those obligations—to the extent permitted by the subject lease—even if the tenant never conducted all appropriate inquiry.

The EPA memorandum specifically notes that the EPA will likely decline to apply BFPP protection to a tenant if (1) the tenant is affiliated with a PRP owner or other responsible party at the site, (2) the lease permits the landlord or tenant to avoid CERCLA liability, or (3) the tenant's potential liability stems from grounds other than its status as tenant.

Despite the EPA's clarification of the BFPP defense, uncertainty still remains as to whether a tenant will be able to successfully argue this or other potentially available defenses. For that reason, addressing environmental matters should be a critical step in all lease negotiations.

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