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The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

New EPA Guidance on Tenants' CERCLA Liability for Leasing Contaminated Properties

The United States Environmental Protection Agency (EPA) recently announced that it will exercise its discretion to treat tenants as “bona fide prospective purchasers” (BFPP) under CERCLA (the federal Superfund law) if the tenants meet certain requirements. This guidance is good news for tenants who lease contaminated property.

CERCLA generally imposes strict liability for cleanup costs on “owners” or “operators” of contaminated sites. “Owners” and “operators” can sometimes include tenants if they exercise sufficient control over the site or over the contamination. However, CERCLA provides liability protection to parties who can demonstrate that they are BFPPs. In general, the BFPP defense is available to a party who acquires ownership of a property after January 11, 2002 and establishes the following:

- All disposal of hazardous substances at the property occurred prior to acquisition;
- The party conducted all appropriate inquiry (AAI) into the previous ownership and uses of the facility;
- The party provides legally required notices;
- The party takes reasonable steps with respect to hazardous substance releases;
- The party provides cooperation assistance and access;
- The party complies with land use restrictions and institutional controls;
- The party complies with information requests and administered subpoenas; and
- The party is not potentially liable for response costs at the facility or “affiliated” with any such person.

Tenants can generally piggyback on the BFPP status of the property owner, provided that the tenant does not impede the performance of any remediation activities. As long as the owner maintains compliance with the BFPP criteria, the tenant who has derived BFPP status does not have any independent duty to carry out those responsibilities.

The EPA’s new guidance clarifies two points about BFPP protection for tenants. First, **a tenant can keep its BFPP status even if the owner loses its BFPP protection** by failing to comply with its continuing obligations. EPA’s position is helpful for tenants, as a tenant need not rely on an owner to keep up with the continuing BFPP obligations. However, in order to maintain BFPP status in these circumstances, a tenant must comply with the same requirements applicable to owners, except that a tenant need not conduct AAI.

Second, the EPA's guidance explains that **a tenant may enjoy BFPP status even if the owner never qualified as a BFPP**. In order to qualify as a BFPP in these circumstances, a tenant must comply with all of the general BFPP requirements applicable to owners, *including* conducting AAI before entering the lease. This guidance is not binding; the EPA retains enforcement discretion to deal with individual cases on a site-specific basis.

In light of the EPA's guidance, tenants should also carefully consider their due diligence strategy before leasing properties that may be contaminated. Proper due diligence may allow tenants to take advantage of the BFPP protection, regardless of the owner's BFPP status.

Please contact any member of the Environment & Energy Strategies Group at Godfrey & Kahn if you have any further questions on the manner in which tenants can develop strategies to avoid cleanup liability at properties they are considering to lease.

EPA's guidance can be found here:

<http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf>

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