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WASHINGTON ENACTS THE FIRST STATE-LEVEL "HSR" PREMERGER NOTIFICATION REQUIREMENT

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Washington has become the first state to enact a comprehensive premerger notification statute, which will take effect on July 27, 2025.[1] The new law will require parties who file under the federal Hart-Scott-Rodino ("HSR") Act to also "contemporaneously" submit a complete electronic copy of their HSR filing to the Washington AG's office if one of the following applies:

- The filing party's principal place of business is in Washington;
- The filing party had annual net sales[2] in Washington of the "goods or services involved in the transaction" of at least 20% of the applicable HSR size-of-transaction threshold in effect at the time; or
- The filing party is a healthcare provider or a provider organization, as defined under Washington law, conducting business in Washington.

Other important elements of the Washington law:

- There is no filing fee;
- The Washington law will not require filing parties to observe a separate suspensory waiting period before closing the transaction;
- The Washington filing obligation applies only to the party that meets the filing criteria, which means that there may be instances where only one of the parties to the HSR filing will be required to submit their filing to the Washington AG;
- Parties filing under the first prong (*i.e.*, those with their principal place of business in Washington) must also provide to the Washington AG a copy of the attachments included with their HSR (including the Transaction-Related Documents and Plans and Reports, where applicable), but parties whose filing was triggered by one of the other two prongs

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TOP ENVIRONMENTAL, HEALTH AND SAFETY ISSUES TO THINK ABOUT IN M&A DEALS

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Environmental, health and safety ("EH&S") considerations can pose material issues and risks in M&A transactions, and early identification of these critical issues can assist buyers in evaluating problems and structuring solutions. It is therefore important to engage environmental subject matter experts early in the deal process, so they can effectively evaluate compliance with applicable EH&S laws and assess liability risks. Often, if a transaction deals with manufacturing, chemicals, or owned real estate, consultants will be used to visit sites or perform a Phase I Environmental Site Assessment ("ESA") or "Phase I-lite" ESA. We are also seeing increased seller-led due diligence, which often includes presentations by consultants or pre-prepared Phase Is upon which buyers can rely. The purpose of seller diligence is to identify issues early so they can be presented in a favorable manner, guide valuations, and avoid surprises which could delay a transaction.

Environmental diligence may include: reviewing a target's environmental operations, permit obligations and compliance, and permit transfer obligations that may be triggered in a transaction; evaluating non-compliances and remedial measures (including capital expenditures); and reviewing potential litigation risks, including from the current or past use of hazardous materials such as asbestos, solvents, per- and polyfluoroalkyl substances ("PFAS"), polychlorinated biphenyls ("PCBs"), or other emerging environmental issues. For both identified and unidentifiable risks, it may be necessary to develop strategies to mitigate future responsibility through indemnities, escrows, or insurance products. For transactions involving non-U.S. target companies, businesses, or assets, local environmental laws and obligations should also be assessed.

Discovery of environmental issues during the due diligence process may lead the parties to modify the agreement to re-allocate costs and/or potential liabilities, including a reduction in the purchase price, contamination indemnities benefiting the buyer, adding escrow to secure the completion of any required environmental cleanup after closing, and/or purchasing a pollution legal liability insurance policy to protect the buyer.

1. Impact of Transaction Structure

Understanding the transaction type and scope, and the associated assets and liabilities, should be a primary EH&S concern for a prospective buyer. The transaction structure will impact the scope of environmental diligence and can affect the range of potential liabilities to be assessed. For example, the type of transaction may impact some state filing requirements, determine permit transfer obligations, and limit the utility of obtaining insurance. A targeted asset purchase which carves out certain high environmental exposure assets may better insulate a buyer from environmental liabilities or obligations. In addition, some environmental permitting or property transfer obligations are not triggered in transactions occurring several corporate levels above the permitted entity. However, permit and/or property transfer obligations may be triggered regardless of the corporate organizational structure in an asset purchase, and will need to be accounted for as part of the transaction.

After evaluating the type and scope of the transaction, the next step is often deciding whether to hire environmental consultants to perform diligence, complete environmental assessment reports (typically a Phase I or Phase II ESA), and assess other technical issues. Understanding the target's operations, real estate portfolio, and potential intersection with environmental laws is critical to making this determination. Some transactions—for example, those involving software companies that only lease commercial office space—are typically not environmentally intensive, and may not require EH&S consultants or more technical diligence. However, if real estate is owned and/or if a target's operations are environmentally intensive (such as

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chemical manufacturing), then more extensive diligence by EH&S consultants may be appropriate.

2. Understanding and Managing Pre-Existing Contamination Liability

While transaction parties often seek to limit future liabilities post-closing, many environmental laws fundamentally attach liability from "cradle-to-grave," even when an entity is no longer associated with a property. Therefore, understanding and managing potential environmental liabilities is crucial in any contemplated transaction.

CERCLA Liability

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[1] as amended, generally determines liability for addressing the cleanup of hazardous materials released into the environment. Notably, liability under CERCLA can be imposed for the presence of hazardous substances at a site even in the absence of fault or knowledge, and any one potentially responsible party can be held jointly and severally liable for the entire cost of the cleanup. As a result, current owners and operators of a site can be held liable for releases occurring at any time in the past—including before the owner or operator was present at the site. Relatedly, former owners and operators remain liable for releases that occurred during their ownership/occupancy.

Liable parties can include (1) current owners and operators of a facility from which there has been a "release or threatened release" of hazardous substances; (2) past owners and operators of a facility at the time hazardous substances were disposed; (3) generators and parties that arranged for the disposal or transport of the hazardous substances to or from the site; and (4) transporters of hazardous waste that selected the site to which the hazardous substances were brought.

With this backdrop, it is essential to understand how transaction structure can impact environmental liability under CERCLA and state equivalents.

In an asset acquisition, a buyer can avoid or limit environmental real estate exposure by qualifying for certain defenses to liability under CERCLA (and often state equivalents), including the Innocent Landowner and Bona Fide Prospective Purchaser defenses. These defenses have various elements that must be satisfied both before and after the purchase of real property, including that the buyer has conducted "all appropriate inquiries" ("AAI") into the history and condition of the property before acquisition. The AAI standard requires obtaining an up-to-date Phase I ESA that meets the current ASTM standard.

In an equity purchase, prospective purchasers cannot avail themselves of the same defenses to liability, even with the completion of a Phase I ESA. Instead, a purchaser in an acquisition of equity interests indirectly inherits the liability of the acquisition target by purchasing its equity interests, standing in place of the former owner. In this situation, because the AAI standard does not apply, the parties have broader latitude to structure diligence, and a formal Phase I ESA is not required. Therefore, a mix of site visits, desktop reviews, or management calls may be sufficient to provide a buyer with an adequate sense of environmental risk or liability. Representations and Warranties Insurers and lenders also are becoming more flexible and accepting of "Phase I-lite" diligence approaches in the context of an equity purchase.

In either case, completing a Phase I ESA and other typical environmental diligence (including standard review of materials, and more limited environmental surveys or reports such as a desktop review and searches of public records) is common and a best practice, as this diligence may provide a prospective purchaser with valuable information that can inform key deal terms even if it does not provide a defense to liability. Additionally, a third-party lender may condition the funding arrangement on the borrower obtaining and providing Phase I ESAs for any property.

State Environmental Protection Act Liabilities

Beyond CERCLA, states may have analogous or unique statutory schemes for the assignment of historic environmental liabilities. For example, in Michigan, the Michigan Natural Resources and Environmental Protection Act ("NREPA") impacts transactions involving assets and operations in the state. Under this scheme, a buyer can purchase contaminated property and be shielded from liability for remediation of known, existing contamination caused by others, but only for certain contamination under specific programs regulated by Michigan's NREPA. To qualify, the

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buyer must (1) perform a baseline environmental assessment ("BEA") and (2) disclose the BEA to the Michigan Department of Environment, Great Lakes, and Energy ("EGLE"), as well as to subsequent buyers and transferees. A BEA assesses the environmental condition of the property to determine if it is contaminated above Michigan's unrestricted residential criteria and includes the results of an AAI and sampling analysis of the property. To provide a liability defense, the BEA must be conducted within 45 days of the buyer becoming the owner/operator of a property.

A BEA does not automatically protect the new owner/operator from other state or federal laws. However, EGLE and U.S. EPA have entered into an agreement that EPA will not act against a property owner who has disclosed a BEA, except under certain circumstances.

3. Managing Compliance Obligations Triggered by the Transaction

Because the federal government and state governments concurrently regulate air and water contamination and discharges of pollutants, state and local governments often regulate or require recordkeeping and filings related to transactions involving property transfers and contamination. For example, for the transfer of certain types of industrial properties and/or properties which are known or suspected to have contamination, several states have laws that require pre-closing evaluations and filings that can affect deal timelines. Below, we discuss two examples: Connecticut and New Jersey.

Connecticut Transfer Act

The Connecticut Transfer Act ("CTA")[2] regulates the "transfer" of certain "establishments" in Connecticut. The CTA term "transfer" refers to a change in ownership of the real property or business, and "establishments" are a defined subset of real properties and businesses. Certain transactions are exempted, including transfers of ownership interests of 50 percent or less. In addition, the CTA may not be triggered in a transaction which occurs several levels above the direct ownership level of the property where the direct property owner remains unchanged. Such a transaction would qualify as an exempt "corporate reorganization not substantially affecting the ownership of the establishment."[3]

Once triggered, the CTA requires disclosure of environmental conditions, investigation, remediation, and liability for transferors and transferees of establishments. The CTA also allows property transferees to recover damages from a transferor who fails to comply with the CTA. Unlike most states, investigation and remediation liabilities under the CTA depend not on whether there has been a documented release of hazardous substances but rather on the volume of hazardous waste generated at the site and whether certain enumerated activities (including dry cleaning operations, furniture stripping, or vehicle body repair) have occurred onsite. As a threshold issue, then, transaction parties need to evaluate the historical and present operations at the site, including any hazardous waste generation.

Next, the parties must decide which entity will be responsible for CTA compliance and to perform a site investigation to determine if prior releases have occurred. Then, the responsible party must enlist a licensed environmental professional to file specific form notices with the Connecticut Department of Energy & Environmental Protection ("DEEP") prior to the transfer, informing DEEP either that no action is required, or that some additional investigation/remediation is needed. No approval is necessary.

The CTA regulatory scheme is evolving. In February 2025, DEEP submitted its "Release Based Cleanup Regulations" ("RBCRs") to the Connecticut General Assembly for review and approval. The RBCRs are intended to better align Connecticut with other states' approaches to releases on real property by applying a uniform regulatory scheme to all properties, without requiring different properties and cleanups to be approached in different ways. In March 2025, the Connecticut General Assembly's Legislative Regulation Review Committee rejected the RBCRs without prejudice, and directed DEEP to make certain changes to the proposed regulation.[4] Until the RBCRs are approved and take effect, the CTA will continue to apply.

New Jersey Industrial Site Recovery Act

New Jersey's Industrial Site Recovery Act ("ISRA")[5] is triggered by the transfer of a qualifying "industrial establishment" and requires the completion of certain reporting, site evaluation, and potential remediation efforts before the transfer or closure of certain industrial properties that may have been contaminated by hazardous substances. This includes transfers of operations, not just ownership. ISRA

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only applies to industrial establishments meeting three conditions: (1) the business has a North American Industry Classification System ("NAICS") number listed in ISRA's Appendix C,[6] (2) the business operated in New Jersey on or after December 31, 1983, and (3) the business uses or stores hazardous substances as defined by the New Jersey Spill Compensation and Control Act.

Establishments may be able to qualify for an exemption, obtain a waiver, or meet alternate compliance conditions with the New Jersey Department of Environmental Protection ("NJDEP").

- The *De Minimis Quantity Exemption* exempts small quantity generators of hazardous materials, so long as the business/property has not exceeded certain gallon/weight thresholds for use, storage, or disposal of hazardous substances at any one time during the owner or operator's tenure.
- The *Remediation in Progress Waiver* allows for the transfer of sites already undergoing remediation with oversight by NJDEP or a Licensed Site Remediation Professional ("LSRP").
- The *Regulated Underground Storage Tank Only Waiver* allows for the transfer of sites without conducting remediation where the only potential Area of Concern ("AOC") or hazardous substance discharge is in connection with a regulated underground storage tank.

If a property or business in a transaction is subject to ISRA and does not qualify for any waivers, exemptions, or alternate compliance processes, then all necessary remediation must be performed pursuant to ISRA. ISRA compliance will result in one of three outcomes: (1) a LSRP issues an Unrestricted Use Response Action Outcome ("RAO"), (2) a LSRP certifies a Remedial Action Workplan ("RAW") prior to the transfer, or (3) the parties execute a Remediation Certificate to allow the transaction to be consummated prior to full ISRA compliance.

ISRA compliance starts with filing a General Information Notice ("GIN") with NJDEP within five days of any triggering event, including transaction signing. An environmental investigation follows, and any required remediation must be completed by a LSRP. This includes a Preliminary Assessment ("PA") to identify potential AOCs and, if necessary, a Site Investigation ("SI") Report to check for contaminants above remediation standards. If the PA identifies no issues, an SI is not needed, and a RAO will be recommended, ending the investigation. If contamination is found, a Remedial Investigation will determine its nature and extent, and a proposed RAW will outline the remediation plan to meet regulatory standards.

As outlined above, compliance with ISRA is a multi-step process that can be costly and time consuming. Determining ISRA's applicability, and whether any waivers, exemptions, or alternate compliance are feasible, are important steps early in a transaction.

4. Permit Transfer Obligations (Change in Control States v. Change in Ownership)

As with the transfer of real property, some transactions may require filings to transfer an environmental permit. Typically, when there is only a change in *control* several levels above the permit-holder, it is rare that a permit needs to be transferred. For example, it is common that air permits need not be transferred when the direct entity *owning* a permitted facility does not change. There are, however, certain state regimes that require an air permit transfer application in the event of a change in *control* of the permitted facility itself. The same typically applies to wastewater discharge or use permits.

5. Evolving Regulations, Areas of Focus, and Technical Understanding Impacting Risk

Environmental laws, regulations, guidance, and areas of regulatory focus—and thus the resulting liabilities—are ever-changing as a result of scientific advancements, changes in political leadership and policy goals, and public interest. For example, regulation of emerging or newly identified contaminants often changes quickly and requires an up-to-date understanding of technical advancements in both testing and remediation technology. These issues can quickly make "stock"/template environmental deal terms outdated—particularly representations regarding compliance with environmental laws and regulations, and regarding use, storage, and disposal of hazardous substances. As a result of the changing environmental status quo, buyers

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should consider close engagement with specialists and consultants to understand the current status and potential future risks implicated by a transaction.

One such contaminant of increasing scrutiny is per- and polyfluoroalkyl substances ("PFAS"), a ubiquitous category of chemicals subject to expanding federal and state regulation. PFAS are of particular concern for manufacturers, waste treatment and/or disposal sites, and sites with a history of fires, but may present a risk in other types of transactions, as well. Other examples of chemicals that have become the focus of recent regulatory scrutiny include 1, 4-dioxane, a chemical used in various industrial processes; glyphosate, a broad-spectrum systemic herbicide that can be of concern for companies involved in landscaping and agricultural operations; and ethylene oxide, a gas often used in chemical manufacturing facilities producing a range of products such as antifreeze, textiles, plastics, detergents, and adhesives. Understanding a target company's operations and the potential presence of emerging contaminants at the target facilities should be an early focus of any buyer.

6. The Role of Insurance in Managing Unknown Liabilities

During due diligence, a Phase I or Phase II ESA may identify potential environmental liabilities and concerns; or, a lack of deep knowledge on the part of a seller may cause a buyer to worry about the "unknown unknowns." In such cases, environmental insurance may provide protection from both identified and unexpected pollution not typically covered by standard casualty and property policies. Environmental insurance can also help cover compliance costs which otherwise could lead to significant fines and issues.

Representations and Warranties Insurance ("RWI") deals are prevalent, particularly because sellers desire a "clean break" post-closing. Adding environmental provisions to RWI coverage may be more efficient than obtaining a separate policy and can be a useful tool to reduce or eliminate unknown risks. In addition to RWI, there are several potentially useful insurance products available depending on the deal structure and nature of the target business.

- *Pollution Legal Liability Insurance* ("PLLI") generally covers third-party claims for property damage, personal injury, and cleanup costs related to environmental contamination.
- *Contractor's Pollution Liability Insurance* ("CPLI") generally covers pollution incidents caused by contractors during their work.
- *Environmental Site Liability Insurance* ("ESLI") generally covers environmental risks stemming from owned real estate or operating facilities, whether the source is traceable to conditions on the insured property or a neighboring property.

PLLI can help manage and allocate environmental risks associated with a transaction. In addition to protection for known and unknown historic pollution risks, it can also cover pollution that arises between signing and closing, or post-closing. Unknown site contamination can lead to significant financial losses, and insurance can smooth out such unpredictable costs.

In a deal environment where sellers wish for a clean break, environmental insurance can bridge the gap and help make an offer more attractive. Post-closing, environmental insurance continues to provide protection against covered environmental liabilities that may arise. This can be particularly valuable for competitive bid transactions where the diligence period is truncated and can provide buyers with some comfort that any inherited environmental liabilities will be covered by the known cost of insurance.

ENDNOTES:

[1]42 U.S.C.A. § 9601 et seq.

[2]CGS §§ 22a-134 to 22a-134e (1985).

[3]*See* Conn. Gen. Stat. §§ 22a-134(1)(H), (22).

[4] https://eregulations.ct.gov/eRegsPortal/Search/RMRView/PR2024-025; https://eregulations.ct.gov/eRegsPortal/Search/getDocument?guid={D071CE95-0000-CA19-89A4-CFC56373AF95}.

[5]N.J. Stat. §§ 13:1K-6 to 13:1K-14 (1983).

[6] https://www.nj.gov/dep/srp/isra/isra_c.htm.

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