



Hazardous Materials and Transfer Agreements

Nicholas M. Oertel & Joel Farrar

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Companies should exercise considerable care before transferring potentially hazardous materials, such as paints, solvents, chemical agents and empty storage drums, to third parties. To avoid potentially onerous statutory penalties, companies considering such a transfer should ensure that the transfer will comply with both state and federal environmental laws. Additionally, companies should understand with whom they are dealing and should enter into an agreement with that person to protect themselves.

Although companies often have no use for their byproduct and waste materials, other companies and individuals may offer to accept such materials for little or no charge. Willing to be free of disposal costs, many companies oblige and release their byproduct and waste materials to others with little thought of the associated legal risks.

As some companies have recently learned, however, if the third party improperly handles, transports, uses or disposes of the materials, an unwitting company may find itself subject to harsh civil and even criminal liability for failing to take reasonable steps to protect itself and society. For example, if the materials require processing before reuse, the transfer may be an improper disposal of waste, even if the third party does not do anything improper with the materials. Accordingly, it is imperative that companies ensure that a transfer is legal and that they are protected from liability before transferring potentially hazardous materials to others.

The most important protective measure after ensuring the legality of a transfer is to perform a due diligence investigation of the potential transferee. The investigation should determine at a minimum whether the transferee holds any required permits for the use and transportation of the materials and whether the transferee is well-established and reputable in the industry. Further investigation may be warranted depending upon the material involved and other circumstances.

AUTHORS/ CONTRIBUTORS

Joel C. Farrar

Nicholas M. Oertel

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Additionally, a company should enter an agreement with the potential transferee that, at a minimum, requires that the potential transferee indemnify the company for damages that the company incurs as a result of the transferee's actions. The agreement may also set forth the obligations of the transferee when dealing with the materials and address other matters. Of course, indemnity will provide protection only if the potential transferee is able to reimburse the company, so companies should consider performing financial due diligence, as well.

Due to the complexity of the environmental laws and the potentially severe liability that a company can incur when transferring potentially hazardous materials, we strongly recommend that companies consult legal counsel before it's too late.

