

CHAPTER 439
FORMERLY
HOUSE BILL NO. 368

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO ABOVEGROUND STORAGE TANKS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §7402A(11), Title 7 of the Delaware Code by making insertions as shown by underlining as follows:

(11) "Owner" means a person:

a. Who has or has had a legal interest in a facility or aboveground storage tank; or

b. Who has or has had an equitable interest in a facility or aboveground storage tank. ~~except when a person holds an interest in a tank as a security interest, unless through foreclosure or other such action the holder has taken possession of or operated the tank.~~

c. "Owner" does not mean any person who, without participating in the management of a facility or aboveground storage tank, holds indicia of ownership in a facility or aboveground storage tank primarily to protect the person's security interest or is a fiduciary which has a legal title to or manages any property for purposes of administering an estate or trust of which such property is part. In the case of foreclosure the person shall not be deemed the owner of the aboveground storage tank provided that the person provides notification to the Department within thirty (30) days of the initiation of foreclosure proceedings for any property containing an aboveground storage tank, either in-service or out-of-service utilizing a form provided by the Department.

d. Participation in management.

1. For purposes of subsection (11), the term "participate in management":

(A) means actually participating in the management or operational affairs of an aboveground storage tank or facility; and

(B) does not include merely having the capacity to influence, or the unexercised right to control, an aboveground storage tank or facility operations.

2. A person that is a lender or a fiduciary and that holds indicia of ownership primarily to protect a security interest in an aboveground storage tank or facility shall be considered to participate in management only if, while the borrower is still in possession of the aboveground storage tank or facility encumbered by the security interest, the person:

(A) exercises decision making control over the environmental compliance related to the aboveground storage tank or facility, such that the person has undertaken responsibility for the regulated substance handling or disposal practices related to the aboveground storage tank or facility; or

(B) exercises control at a level comparable to that of a manager of the aboveground storage tank or facility, such that the person has assumed or manifested responsibility for the overall management of the aboveground storage tank or facility encompassing day-to-day decision making with respect to environmental compliance, or over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the aboveground storage tank or facility other than the function of environmental compliance.

3. The term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in an aboveground storage tank or facility; and

4. The term "participate in management" does not include:

(A) holding a security interest or abandoning or releasing a security interest;

(B) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(C) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(D) monitoring or undertaking 1 or more inspections of the aboveground storage tank or facility;

(E) requiring a corrective action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the aboveground storage tank or facility prior to, during, or on the expiration of the term of the extension of credit;

(F) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the aboveground storage tank or facility;

(G) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(H) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(I) conducting a corrective action, if the actions do not rise to the level of participating in management (within the meaning of paragraphs d.1. and d.2.

5. A person who is a lender that did not otherwise participate in the management of a facility as provided in subparagraph (c) of this section shall not be considered to have participated in management, notwithstanding that the person:

(A) forecloses on the property; and

(B) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the property, maintains business activities, winds up operations, or undertakes corrective actions of this chapter.

e. A fiduciary as described in this section shall not be liable in its personal capacity under this chapter for:

1. Undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the facility;

2. Terminating the fiduciary relationship;

3. Including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

4. Monitoring or undertaking one or more inspections of the facility;

5. Providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

6. Restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

7. Administering, as a fiduciary, a facility that was contaminated before the fiduciary relationship began; or

8. Declining to take any of the actions described in subparagraphs 2. through 7.

f. The liability of a fiduciary under any provision of this chapter for the release or threatened release of a regulated substance at, from, or in connection with a facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity; provided, however, that this limitation shall not apply to the extent that a person is liable under this chapter independently of the person's ownership of a facility as a fiduciary or actions taken in a fiduciary capacity.

g. The exclusion from liability contained in this paragraph c. does not limit liability pertaining to the release or threatened release of a regulated substance if negligence of a fiduciary causes or contributes to the release or threatened release.

h. Nothing contained in this paragraph c.:

1. Affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this paragraph; or

2. Creates any liability for a person or a private right of action against a fiduciary or any other person.

(i) Nothing in this paragraph c. applies to a person if the person:

1. Acts in a capacity other than that of a fiduciary or in a beneficiary capacity, and in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

2. Is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(j) This paragraph c. does not preclude a claim under this chapter against:

1. The assets of the estate or trust administered by the fiduciary; or

2. Nonemployee agent or independent contractor retained by a fiduciary.

Section 2. Amend § 7402A, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

(5) “Fiduciary” means:

a. A person acting for the benefit of another party as a bona fide:

1. Trustee;

2. Executor;

3. Administrator;

4. Custodian;

5. Guardian of estates or guardian ad litem;

6. Receiver;

7. Conservator;

8. Committee of estates of incapacitated persons;

9. Personal representative;

10. Trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

11. Representative in any other capacity that the Secretary, after providing public notice, determines to be similar to the capacities described in paragraphs 1 through 10 above; and

b. “Fiduciary” does not mean:

1. A person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person; or

2. A person that acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or of any other person.

(6) “Fiduciary capacity” means the capacity of a person in holding title to a facility, or otherwise having control of or an interest in the facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(7) “Foreclosure; foreclose” mean, respectively:

a. Acquiring, and to acquire, a facility through:

1. Purchase at sale under a judgment or decree, power of sale, or non-judicial foreclosure sale;

2. A deed in lieu of foreclosure, or similar conveyance from a trustee; or

3. Repossession,

b. If the facility was security for an extension of credit previously contracted:

1. Conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

2. Any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a facility in order to protect the security interest of the person.

Section 3. Amend § 7402A, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

(10) "Lender" means:

a. An insured depository institution (as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c)(2)) or an insured credit union (as defined in the Federal Credit Union Act at 12 U.S.C. § 1752(7)) authorized by law to do business in this State;

b. A bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. § 2001 et seq., as amended) authorized by law to do business in this State;

c. A leasing or trust company that is an affiliate of an insured depository institution authorized to do business in this State;

d. Any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

e. Any legal entity authorized, to buy or sell loans or interests in loans in a bona fide manner in this State;

f. A person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

g. A person that provides title insurance and that acquires a facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

Section 4. Amend § 7402A, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

(20) "Security interest" means an interest in an AST or AST system or in a facility or property on which an AST or AST system is located , created or established for the purpose of securing a loan or other obligation. Security interests include but are not limited to mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain, certain assignments, factoring agreements, accounts receivable financing arrangements, and assignments, if the transaction creates or establishes an interest in an AST or AST system or in the facility or property on which the AST or AST system is located, for the purpose of securing a loan or other obligation

Section 5. Amend §7416A(b)(2), Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underlining as follows:

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property upon which funds have been expended by the State pursuant to § 7406A of this title and which is owned by a person liable under this chapter when:

(2) No less than 30 days prior to the effective date of the lien, a A notice of lien is filed by the Secretary with the office of the recorder of deeds in the county in which the property is located; and

Approved October 06, 2014