



MEMORANDUM

TO: Bob Klein, Chair, and Members of the
Alcoholic Beverage Control Board

DATE: August 14, 2018

FROM: Erika McConnell, Director

RE: Regulations Change: Security
Interest Transfers/Involuntary
Retransfers

Statutory Authority: AS 04.06.100(a): “The board shall adopt regulations governing the manufacture, barter, sale, consumption, and possession of alcoholic beverages in the state that are consistent with this title and necessary to carry out the purpose of this title in a manner that will protect the public health, safety, and welfare.”

Status: Public comment period ended June 1, 2018

Background: This draft project proposes the following:

- A new section on security interest transfers is created at 304.106.
- The information relating to how a security interest transfer must be established in order to perform an involuntary retransfer is moved from 304.107 to the new section 304.106.
- Security interest transfers may not be established unless 100% of the license ownership changes. A licensee could not establish a security interest during a controlling interest transfer.
- A license with an established security interest can't be transferred unless the security interest obligation is satisfied.
- The board is no longer required to use “accepted business principles” to determine whether the independent value of the property being conveyed is sufficient to justify the taking of a security interest. Instead, the board is required to determine that the value of the property is sufficient to determine that the license is not being used as collateral, which would be a violation of AS 04.11.670.

3 AAC 304 is amended by adding a new section to read:

3 AAC 304.106. Security interest transfers.

(a) A licensee, wishing to establish a security interest in a license being transferred to a new owner, shall submit the following documents with the transfer application:

(1) a leasehold conveyance or contract of sale of property made in the course of the license transfer, recorded in the manner provided for recordation of real estate conveyances, along with a UCC filing statement in which a security interest in the license is claimed under AS 04.11.670 and AS 04.11.360(4)(B); the documents recorded under this paragraph must contain the following statement: "Under the terms of AS 04.11.670, AS 04.11.360(4)(B), and 3 AAC 304.106, the transferor/lessor retains a security interest in the liquor license that is the subject of this conveyance, and may, as a result, be able to obtain a retransfer of the license without satisfaction of other creditors.";

(2) a list of property being conveyed from the transferor to the transferee, along with the value of the property. The value shall be sufficient for the board to determine that the license is not being used as collateral as prohibited by AS 04.11.670; and

(3) all leases, contracts, and other relevant memoranda relating to the lease or sale of property in conjunction with the license transfer.

(b) The transferor must include in the published notice of transfer required by AS 04.11.310(a), the following statement: "Under the terms of AS 04.11.360(4)(B), AS 04.11.670, and 3 AAC 304.106, the transferor/lessor retains a security interest in the liquor license that is the subject of this conveyance, and may, as a result, be able to obtain a retransfer of the license without satisfaction of other creditors."

(c) A security interest in a license may not be established when the license transfer contemplates a transfer of less than 100% of the interest in the license.

(d) A license with an established security interest may not be transferred to a new owner unless all obligations under the security interest are satisfied prior to or as part of the transfer.

3 AAC 304.107 is amended to read:

3 AAC 304.107. Compelled transfer of license; security interest

(a) If **the**[A] former licensee seeks to compel the transfer of a license because of a promise under AS 04.11.670 given as collateral by the current licensee to the former licensee in the course of an earlier transfer of the license, followed by a default in payment in connection with property conveyed or a lease made in the course of the previous transfer, the board will deny the transfer if creditors are not satisfied under AS 04.11.360(4)(A) unless it clearly appears that: [THE FORMER LICENSEE, AT THE TIME OF THE PREVIOUS TRANSFER, COMPLIED WITH THE FOLLOWING NOTICE REQUIREMENTS:]

(1) **the security interest was established in the previous transfer in accordance with 3 AAC 304.106;**[A LEASEHOLD CONVEYANCE OR CONTRACT OF SALE OF PROPERTY MADE IN THE COURSE OF THE PREVIOUS LICENSE TRANSFER WAS RECORDED IN THE MANNER PROVIDED FOR RECORDATION OF REAL ESTATE CONVEYANCES, AND THE TRANSFEROR, AT THE TIME OF THE PREVIOUS TRANSFER, MADE A UCC FILING STATEMENT IN WHICH A SECURITY INTEREST IN THE LICENSE WAS CLAIMED UNDER AS 04.11.670 AND AS 04.11.360(4)(B); THE DOCUMENTS RECORDED UNDER THIS PARAGRAPH MUST CONTAIN THE FOLLOWING STATEMENT: "UNDER THE TERMS OF AS 04.11.670, AS 04.11.360(4)(B),

AND 3 AAC 304.107, THE TRANSFEROR/LESSOR RETAINS A SECURITY INTEREST IN THE LIQUOR LICENSE THAT IS THE SUBJECT OF THIS CONVEYANCE, AND MAY, AS A RESULT, BE ABLE TO OBTAIN A RETRANSFER OF THE LICENSE WITHOUT SATISFACTION OF OTHER CREDITORS."; AND]

(2) **the former licensee operated the license that was transferred for at least 30 eight-hour days and;**[ALL DOCUMENTS PREPARED IN CONNECTION WITH THE PREVIOUS TRANSFER OF THE LIQUOR LICENSE, INCLUDING ALL LEASES, CONTRACTS, AND OTHER RELEVANT MEMORANDA, WERE FILED WITH THE BOARD AT THE TIME OF THE PREVIOUS TRANSFER; THE DOCUMENTATION MUST INCLUDE A STATEMENT OF THE BOOK AND PAGE NUMBER SHOWING WHERE THE LEASE OR CONTRACT, AND UCC FILING STATEMENT, BEARING THE DISCLOSURE STATEMENT REQUIRED IN (1) OF THIS SUBSECTION, ARE RECORDED; AND]

(3) **the term of a security interest in a license to secure payment for personal property did not exceed 10 years.** [THE NOTICE OF THE PREVIOUS TRANSFER REQUIRED BY AS 04.11.310(A) WAS MADE IN WRITING AND PUBLISHED, AS REQUIRED UNDER 3 AAC 304.125, ONCE A WEEK FOR THREE WEEKS IN A NEWSPAPER OF GENERAL CIRCULATION BEFORE THE TRANSFER, IN ADDITION TO ANY OTHER NOTICE OF THE APPLICATION THAT MIGHT HAVE BEEN REQUIRED BY THE BOARD AT THE TIME OF THE PREVIOUS TRANSFER; THE PUBLISHED NOTICE MUST CONTAIN THE FOLLOWING STATEMENT: "UNDER THE TERMS OF AS 04.11.360(4)(B), AS 04.11.670, AND 3 AAC 304.107, THE TRANSFEROR/LESSOR RETAINS A SECURITY INTEREST IN THE LIQUOR LICENSE

THAT IS THE SUBJECT OF THIS CONVEYANCE, AND MAY, AS A RESULT, BE ABLE TO OBTAIN A RETRANSFER OF THE LICENSE WITHOUT SATISFACTION OF OTHER CREDITORS."]

(b) The director may identify, in board meeting agendas, those applications for transfer of ownership that are secured as described in this section.

[(C) A FORMER LICENSEE MAY NOT COMPEL RETRANSFER OF A LICENSE UNDER AS 04.11.360(4)(B) AND AS 04.11.670 UNLESS

(1) THE FORMER LICENSEE OPERATED THE LICENSE THAT WAS TRANSFERRED FOR AT LEAST 30 EIGHT-HOUR DAYS; AND

(2) PROPERTY, WITH THE EXCEPTION OF CORPORATE STOCK OR A LEASE CONVEYANCE, CONVEYED AT THE TIME OF LICENSE TRANSFER HAD SUFFICIENT INDEPENDENT VALUE APART FROM THE LICENSE SUFFICIENT IN THE DETERMINATION OF THE BOARD TO JUSTIFY THE TAKING OF A SECURITY INTEREST IN THE LICENSE; THE TERM OF A SECURITY INTEREST IN A LICENSE TO SECURE PAYMENT FOR PERSONAL PROPERTY MAY NOT EXCEED 10 YEARS; IN DETERMINING WHETHER THE PROPERTY VALUE IS SUFFICIENT UNDER THIS SUBSECTION, THE BOARD WILL UTILIZE ACCEPTED BUSINESS PRINCIPLES.]

(c)[(D)] After the foreclosure of real property that secures payment of a debt also secured by a promise under AS 04.11.670, a license may not be retransferred without satisfaction of creditors under AS 04.11.360(4)(A) unless

(1) the board approved an application for retransfer before the foreclosure; or

(2) the amount owed to the former licensee for the real property at the time of foreclosure exceeds the fair market value of the property; the former licensee carries the burden of proof to show that the fair market value is less than the amount owed.

From: George Tipton
To: [CED AMCO REGS \(CED sponsored\)](#)
Subject: Security Interest transfers
Date: Wednesday, May 30, 2018 2:15:39 PM

ABC Office and Board

I am opposed to the department changing 3 AAC 304.106. Security interest transfers. This system has worked well since Statehood, is not broken and has been utilized by many over that period of time. For the Department to now interpret things differently than have been understood, known and acted upon by many is totally wrong. This is not the only thing that the current department has tried to change.

Why do you not let every license owner know exactly what you feel is wrong with a Security Interest being held by a Seller and what part of it is the problem? Also tell us what has occurred that prompted this change in what has been accepted as the norm for 60 years? For us to read your proposed changes and what they are supposed to do requires an attorney to understand. Please put it into layman's terms as I have requested and then extend the comment period to after we have received an explanation and exactly what it is you are after.

From the little I do understand in the verbage contained in some of the language, you want the majority of the information that is agreed upon between the Seller and the Buyer. The Department already has information on the Seller or they would not have issued them a license in the first place. When a transfer occurs, the Buyer must fill out paperwork to satisfy the Department as has been occurring for years. Information other than what has been required for these is none of the Department's business and is a legal agreement between the two parties.

The same can be said for the Tribal ID issue and trying to make the TAP class all on-line.

It is troubling that all these proposed changes continue to occur when they have been working fine, but it takes 6 months for me to receive my Liquor License after I submit my renewal.

I proposed many years ago that the department go to a DMV type system. The renewals would still be every 2 years but in different months. This way you do not have 850 – 900 renewal approvals before the Board in the 1st meeting of each year. They can be spread out through the 5 meetings that occur. It also make it easier for the licensing section to do their due diligence on each application. This would be a very easy change. This why I suggest explaining to us what you are trying to accomplish by some of the changes and we may be able to help and/or modify it for the betterment of all or just tell you why it is wrong and to

just leave something alone.

Thank you for your time

George Tipton

Multiple License Owner

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From: Dale Fox
To: [CED AMCO REGS \(CED sponsored\)](#)
Subject: Security Interest Transfers 3 AAC 304.106 and 3 AAC 304.107
Date: Friday, June 01, 2018 2:09:04 PM
Attachments: [image001.png](#)

To: ABC Board

From: Pete Hanson, President & CEO Alaska CHARR

Re: Security Interest Transfers 3 AAC 304.106 and 3 AAC 304.107

May 31, 2018

It is difficult to understand the public purpose of pages of regulations to describe what is allowed between two business people who want to make a financial deal related to the sale of a business. It is baffling to understand why the state is dictating the term of the agreement, the percentage of the business sold and the quality of the collateral.

It would be valuable for the board to discuss at a public meeting the public purpose for these regulations. Once we all have a clear understanding of the purpose, evaluating the proposed regulations to ensure they meet the needs of the State of Alaska is more rational. Alaska CHARR believes both the legislative statute and the expansive regulations go well beyond that which is needed to provide for a well regulated industry.

One obvious purpose is to ensure a well regulated industry so that licensees are not running up bills and then skipping out. The practice of requiring licensees to have bills paid prior to the Board approving a transfer seems to take care of the issue.

Alaska CHARR staff hired attorney Dan Coffey who probably has more experience than all of us combined with security interest agreements to provide his evaluation.

Based on Mr. Coffey's analysis there seems to be a number of problems with the proposed regulation. We encourage the board to evaluate both the purpose and the solutions carefully.

Pete Hanson, President and CEO
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MEMO TO ABC BOARD

TO: ABC Board
CC: Erika McConnell
FROM: Dan K. Coffey
RE: Security Interest Transfers 3 AAC 304.106 and 3 AAC 304.107
DATE: 6-1-18

The Regulations that are proposed by staff and to which we are responding are as follows:

1) Security Interest Transfers and Involuntary Retransfers.

The staff has proposed a brand-new section **3 AAC 304.106**. This proposed regulation has four (4) sections and three (3) subsections. We will identify each in the following analysis.

Section (a) No issues

Sub-Section (a) (1):

Issue: The UCC document which is to be “filed” (not “recorded”) is a “UCC Financing Statement” NOT a “UCC filing statement”.

Sub-Section (a) (2):

Issue: The required “list” of property being conveyed should be amended so that the correct terminology/phrases are used.

- Real property is “conveyed”.
- Personal property is “transferred”

This provision should read as follows: “(2) a list of the **personal** property being conveyed from the transferor (?seller?) to the transferee (?Buyer?), along with the value of the personal property”.

The balance of this paragraph (a) (2) is acceptable.

Sub-Section (a) (3):

Issue: It is unclear what is meant by “other relevant memoranda related to the lease or sale of property in conjunction with the license transfer”. A clear provision is the following:

“All transaction and security documents associated with the sale of the real and personal property of the Seller being transferred to the Buyer shall be submitted as part of the transfer application. These documents shall be retained in a confidential file not available to the public.

Rationale for this proposed provision:

- i) In any secured transaction involving real and personal property, there will be a Contract of Purchase and Sale describing what is being sold (real and personal property and the liquor license), a Bill of Sale for the Personal Property and a Deed for the real property.
- ii) If the real property is not being sold, but is being leased, there will be a Lease and a Notice of Lease will be recorded.
- iii) If the sale is financed by the Seller there will be a Promissory Note for personal property and a Deed of Trust Note for real property. If both real and personal property are being sold together (as is usually the case) then the payment provisions will be described in a Deed of Trust Note. There will also be a Security Agreement, a Limited Power of Attorney authorizing the retransfer of the license in the event of default and probably a Guaranty.
- iv) Finally, there will be other security related documents such as UCC financing statements, a UCC termination statement and a permanent escrow into which payments are to be made.

Section (b): No Issues

Section (c): This provision makes no business sense.

Suppose that there are two owners of a licensed business. One is 60 and the other is 40. The both own 50% of the business. The 60-year-old wants to retire. He wants to sell his half of the business to the 40-year-old. He is willing to finance the deal, but he would like to obtain a security interest in the real and personal property of the business along with the liquor license.

If the suggested provision is adopted, that would not be possible. What is the justification for such a regulation? What harm can come from allowing a transaction like the one described above to occur?

Section (d): This is another provision that makes no business sense.

Assume that one party, a prior licensee, sold a license and now holds a security interest in that license along with the real and personal property. Further assume that there was one Buyer who now owns the licensed business. The single Buyer/current owner dies. His wife, who was not on the license now would be required to pay off the debt to the seller in order to have the licensed transferred to her with a brand-new security interest in favor of the original licensee.

We can determine no rational basis for this proposed provision. The key elements of the secured transaction, Board approval of the transaction would all be repeated when the estate of the deceased licensee transfers the license and the property to the widow with the existing security interest continuing. Where is the harm in that?

3 AAC 304.107

Section (a): No Issues

Subsection (a) (1): No issues

Subsection (a) (2): This section requires that the transferring licensee “operated the license that was transferred for at least 30 eight-hour days”

This is a renewal issue. It does not belong here in the secured transaction section of the regulations.

Surely the staff does not mean that, as a condition of transfer, the transferor has to have operated for thirty days of 8 hours each day in the year of the transfer. Assume the following facts:

- i) Current licensee decides on October to sell his business and after operating full time for 10 months. He finds a buyer, they sign contract and the transfer process begins.
- ii) By the end of the year, the posting and advertising of the transfer is complete and filed with the Board. The matter is scheduled for the next Board meeting.
- iii) The Seller, knowing that business is slow in January and February shuts down the business leaves on a long and well deserved vacation. He returns for the February Board meeting in Juneau only to learn that since he has not operated for thirty-eight hour days in the current calendar year, he cannot get a security interest in his business.

The point here is that the operating requirement has nothing to do with whether or not a secured transaction can be approved by the Board.

If a Seller did not operate for the minimum required days and hours in the year prior to the sale, then the license would not be renewed. Hence, there would be no license for sale.

To require that the Seller operate for a minimum period in the year of the transfer for should not be a condition for a secured transaction particularly when the buyer would have the same minimum operating requirement imposed on him or her.

Subsection (a) (3): No issues.

Section (b): While this provision exists as a current regulation, the use of the phrase “[t]he director **may** identify”, should be amended to state that “the director **shall** identify” a transaction as one with a security interest.

Subsection (c) (2) When Section (c) is combined with along with subsection (c) (2) it reads as follows:

- (c) After the foreclosure of real property that secures payment of a debt also secured by a promise under AS 04.11.67, a license

may not be retransferred without satisfaction of creditors under AS 04.11.360(4(A) unless... (2) the amount owed to the former licensee for the real property at the time of foreclosure exceeds the fair market value of the property; (burden on former licensee).

The apparent rationale for this provision is that a liquor license, standing alone, cannot be collateral for a debt. However, the effect of this provision is that anyone knowledgeable in foreclosures where a liquor license was part of the transaction, will never complete a foreclosure on the real property without having first transferred the liquor license and other personal property either concurrent with the foreclosure on the property or prior to foreclosure.

The question, however, is why would the Board lay a trap for the unwary. If a transaction was recognized as a secured transaction at its inception why should the order of retaking the secured property (real and personal) be of any concern to the Board?

The better practice would be to eliminate Section (c) in its entirety.

Respectfully submitted this 1st day of June, 2018.

Dan K. Coffey
Alaska Bar No. 75-05011