



MEMORANDUM

TO: Bob Klein, Chair, and Members of the Alcoholic Beverage Control Board DATE: December 17, 2018

FROM: Erika McConnell, Director RE: Regulations Project: 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: Draft with revisions based on public comments

Background: At the October 2018 meeting, the board asked staff to make revisions to the language of this proposal based on public comments received. The attached draft shows changes made (using tracked changes). The changes:

- Clarify that a UCC Financing Statement is filed if personal property is used as collateral for a loan, rather than real property;
- Provide for an exception to the re-transfer of a license with a security interest in the case of the death of a licensee;
- Change the “30 eight-hour days” requirement to “240 hours” to match statutory changes; and
- Clean up some of the language.

Should the board be satisfied with the changes, the draft should be put out for public comment again.

Older 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.

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- 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 real property made in the course of the license transfer, if any, 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 personal property being conveyed from the transferor to the transferee, along with the value of the property and a UCC financing 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.". 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~~ transaction and security documents relating to the lease or sale of real property and/or sale of personal 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, except that the board may make an exception in the case of the death of a licensee.

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~~240 hours 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.