THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Commerce, Community, and Economic Development

ALCOHOL AND MARIJUANA CONTROL OFFICE
550 West 7th Avenue, Suite 1600
Anchorage, AK 99501
Main: 907.269.0350

MEMORANDUM

TO: Members of the Alcoholic Beverage Control Board

DATE: June 16, 2024

FROM: Joan M. Wilson, Director

RE: Revised Interpretation of Controlling Interest

On February 19, 2019, AMCO offered this board an interpretation of "controlling interest" solely determined by an individual or collective 50.01% ownership of the shares of a business entity. This memorandum revises that interpretation.

AS 04.11.040(c) states,

> A person may not receive or transfer **controlling interest in a liquor license** issued to a partnership, including a limited partnership, a limited liability organization, or a corporation under this title, except with the written consent of the board."

"Controlling interest" is not defined in either statute or regulation. However, as that statute makes clear, what is at issue is controlling interest in the license, not necessarily the business entity.

As its first line of review of controlling interest, the Office remains committed to a determination that any answer of yes to the below questions operates presumptively as a controlling interest change.

- Has the ownership of 50% of the license changed?
- Has a person who did not used to own 50% now become an owner of 50% or more?
- Has the number of people needed to create a majority of shares changed? (Example: Person 1 owns 26%; Person 2 owns 26%; Person 3 owns 26%; and five other people own small percentages to make up the remaining 22%. In this scenario, any two 26% shareholders can act with a majority. They propose to change the ownership structure so that Person 1 owns 25%; Person 2 owns 25%; Person 3 owns 25%; and five other people own 5% each. Now, at least three people are needed to act with a majority.)

Staff will inform applicants the change requires a transfer application. However, after receiving that determination in writing, the applicant may ask for reconsideration to the Director. Upon requesting reconsideration, the applicant must provide operating agreements or other business entity documents establishing that even with the change in percentage controlling interest to take actions regarding the alcoholic beverage license has not changed (for example, a silent partner acquires an economic interest in the business entity but expressly has no authority to make any decisions that might impact the license, such as sale of licensed premises, sale of the alcoholic beverage license, applying for new endorsements).

Upon receipt of this information, the Director will consult with the Department of Law and issue a written determination of whether a controlling interest change has occurred, and a transfer application is necessary. Factors that might impact such a decision include contract features, such as how management deadlock provisions apply regarding the license.

Before adopting this approach, the Director seeks Board approval of this revised approach to controlling interest changes.

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Anchorage, AK 99501
Main: 907.269.0350

MEMORANDUM

TO:	Bob Klein, Chair, and Members of the Alcoholic Beverage Control Board	DATE:	February 19, 2019
FROM:	Erika McConnell, Director	RE:	Interpretation of Controlling Interest

Requested Action: Move to adopt staff's interpretation of "controlling interest" as laid out below
OR
State and adopt board's interpretation of "controlling interest"

Statutory Authority: AS 04.06.090(a): "The board shall control the manufacture, barter, possession, and sale of alcoholic beverages in the state. The board is vested with the powers, duties, and responsibilities necessary for the control of alcoholic beverages,…"

Staff Rec.: Adopt staff's interpretation of "controlling interest" which has been the office's interpretation for a long time, and which preserves the board's control and authority over licenses

AS 04.11.040(c) states, "A person may not receive or transfer controlling interest in a liquor license issued to a ….. corporation under this title, except with the written consent of the board." "Controlling interest" is not defined in either statute or regulation. I am seeking the board's support for the interpretation of controlling interest that has been standard in the office for a long time.

When examining whether or not a change of ownership is a change in controlling interest, staff considers the following:

- Has the ownership of 50% of the license changed?
- Has a person who did not used to own 50% now become an owner of 50% or more?
- Has the number of people needed to create a majority of shares changed? (Example: Person 1 owns 26%; Person 2 owns 26%; Person 3 owns 26%; and five other people own small percentages to make up the remaining 22%. In this scenario, any two 26% shareholders can act with a majority. They propose to change the ownership structure so that Person 1 owns 25%; Person 2 owns 25%; Person 3 owns 25%; and five other people own 5% each. Now, at least three people are needed to act with a majority.)

If the answer to any of those questions is yes, then this is considered to be a change in controlling interest and a transfer is required. However, staff applies these questions only to the entity that owns

the license. If the license is owned by Entity A, which is owned by Entity B, staff does not require a change in controlling interest of Entity B to be approved by the board.

These considerations apply to all types of ownership structure: sole ownership, limited liability organizations, corporations, and partnerships.

This interpretation allows the board to see and approve the individual(s) who will control the license. Does the board agree with this interpretation?

Some licensees (or their representatives) dispute this interpretation. In a current, relevant situation, a company has issued new shares to new shareholders, diluting the shares of the existing shareholders. The entity had four shareholders, each with 25%. By issuing new shares to new shareholders, they now have eight shareholders, each with 12.5%. They submitted the following statements:

> Our research on corporate law shows that a controlling interest in a corporation is generally defined as ownership greater than 50% (or 50% + .01) interest (e.g., the ability to elect a majority of the board of directors), and a 50% interest is considered a non-controlling interest.
>
> In [our] situation, no one person received or holds a controlling (in excess of 50%) interest. Each person holds a 12.5% non-controlling interest. No person received controlling interest in a liquor license by owning a 12.5% interest in [our corporation]. No one person can elect a majority of the board of directors. Therefore, no person holds a controlling interest in the licenses. When considering how many shareholders it takes to reach a majority after [our corporation] issued new shares, it would take at least 5 of the 8 shareholders to reach majority consensus, and not 4. The 4 new shareholders, even when combined, do not create a majority or controlling interest.
>
> Accordingly, by our analysis, no person has received or transferred controlling interest in a liquor license after the issuance of new shares.

Under this interpretation, if no single person holds 50% interest, then there is no controlling interest under Title 4. Thus in a situation where a multitude of people own a liquor license but no single person owns 50% or more, the control of the license could shift regularly with only notification to the board. This does not seem to achieve the intent of Title 4, which gives the board the authority to review and approve the ownership (and thus control) of licenses.

At the January 2018, meeting, the board formed a subcommittee of one (Rex Leath) to more closely examine the question. Captain Leath met with me and former Program Coordinator Sarah Oates. Captain Leath expressed the opinion that the board should be more concerned about changes where control of a license/licensed entity is consolidated to fewer people, and less concerned about changes where control is spread out to more people. Staff agreed to research the types of controlling interest transfers that have been brought to the board.

Between January 2015 and December 2018, the board considered 168 controlling interest transfers.

Of those:

- 89 transferred control of the entire entity to a different person/entity—this is similar to a change in license ownership, as the ownership of the entity that holds the license is changing
- 5 transferred control from **one** person to **one** different person (often but not always, 50% or more of the stock changed hands)
- 10 transferred control from **two** people to **two** different people with 50% or more of the stock changing hands
- 51 transferred control from **two** people to **one** person
- 4 transferred control from **three** people to **two** people
- 4 transferred control from **one** person to **two** people
- 1 transferred control from **two** people to **five** people
- 4 issued unissued stock, appearing to create control by **one** person

Over the past four years, of the 168 controlling interest transfers brought before the board, only five of them spread control to more people than originally held control. Given the thoughts expressed by Captain Leath, it appears that the current interpretation of "controlling interest" is working well for the board.

Should the board wish to make a change to how it interprets "controlling interest," a regulations project may be warranted in order to provide proper notice and the opportunity for public comment.

Attachment: Comments received

LANDYE BENNETT BLUMSTEIN LLP
ATTORNEYS

MEMORANDUM

TO: Robert Klein, Chair, and
Members of the Alcohol Beverage Control Board

FROM: Robert H. Hume, Jr.

DATE: December 26, 2017 Our Client No: 13770-001

RE: Transfer of a Controlling Interest

We understand that Ms. McConnell has asked the Board to support the staff's interpretation of "controlling interest." We have reviewed Ms. McConnell's November 13, 2017, memorandum to the Board on this topic. The staff's interpretation is incorrect and inadequate, for the reasons described below.

We represent a company (the "Licensee") that holds a beverage dispensary license. The Licensee is an Alaska limited liability company. It is owned and managed by three members: Member A holds 44%, Member B holds 44% and Member C holds 12%. The Licensee has operated for several years without any change in membership or management. Member B and Member C are brothers.

Member A intends to transfer his interest in the Licensee proportionally, or substantially proportionally, to Member B and Member C. Member A will cease to be a manager of the Licensee. Since this involves a transfer of at least 10% of the membership of the Licensee, and since Member A also will cease to be a manager of the Licensee, in accordance with AS 04.11.045 the Licensee will report these changes of membership and management to the Board.

We believe the proposed transaction does not result in receipt or transfer of a controlling interest, and no further action will be required by the Licensee or the Board.

Receive or transfer controlling interest

It is first important to note that "controlling interest" is relevant to the ABC Board only when a person receives or transfers a controlling interest in a liquor license issued to an entity.[1] Contrary to Ms. McConnell's frequent references to a "change in controlling

[1] AS 04.11.040

interest," Title 4 does not require board approval for a "change" in controlling interest.[2] Instead, it requires that a person "receive or transfer" a controlling interest. This leads to a need to define what constitutes a controlling interest.

Staff interpretation

According to Ms. McConnell, the staff considers there to be a "change of ownership" that requires board approval if any of the following occurs:

1. Ownership of 50% of the license has changed

2. A person who did not own 50% becomes an owner of 50% or more[3]

3. The number of people need to create a majority has changed

Applied to the Licensee, rule #1 would not apply. Member A owns 44% so less than 50% would change.

We assume staff would conclude that rules #2 and #3 would apply since Member B would go from owning 44% to owning more than 50%, and the number of people needed to create a majority would go from 2 to 1.

Controlling interest

The first problem with the staff interpretation is that it looks at ownership of the equity interests of a licensee, but Title 4 looks at control of a licensee. If the license was held by a limited partnership, a limited partner might own 80% of the licensee but the general partner owning 20% would have sole, actual control of the licensee. If the limited partner transferred his 80% interest, there would be no change in the control of the licensee. The 80% would not be a "controlling interest." If the general partner transferred his 20% interest there would be a transfer of a controlling interest even though none of the staff's rules would apply. The staff interpretation incorrectly assumes that control is proportional to equity ownership, which is not always correct. These staff rules may indicate a change of ownership, but they do not address control of the licensee or a transfer of a controlling interest.

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[2] Note, in contrast, that the marijuana regulations *do* require approval of a "change in controlling interest." 3 AAC 306.040. There is no similar statute or regulation regarding alcohol.

[3] Incidentally, Ms. McConnell typically describes ownership of 50% or more as a controlling interest. Ownership of exactly 50% does not equal a controlling interest. This lesson is often painfully learned by 50-50 partners who disagree on a matter.

A "controlling interest," when dealing with entities, often is defined as having the right to appoint or elect a majority (more than 50%) of the managing body (the board of directors, managers, etc.).

Member A is one of 3 managers of the Licensee, and therefore does not have a controlling interest, so he could not transfer a controlling interest. Indeed, if he has a controlling interest when he owns 44%, then Member B already has a controlling interest since he also owns 44%.

After the transfer, Member B and Member C will be the two managers. Member B will not become the sole manager. Member C also will be a manager. Therefore, neither Member B nor Member C will have control over management of the Licensee and neither Member B nor Member C would receive a controlling interest.

10% owners

Ms. McConnell's explanation for the staff interpretation is that it allows the board to see and approve the individuals who will control the license.

We do not disagree with that goal. The board *should* see and have the power to approve the individuals who will control the license.

But in the case of the Licensee everyone who will receive Member A's interest is already a 10% member of the Licensee. Everyone who will receive Member A's interest is already a person who the board has approved to control the license. Ms. McConnell's explanation of the reason for the staff interpretation is achieved when notice of change is given and only preexisting 10% members are involved. Further board action is not needed.

The goal of the interpretation is adequately addressed by requiring any change of 10% members or managers to be reported to the board.[4] The board has adequate authority to suspend or revoke the license if it concludes the change in membership or management is not in the public interest.[5]

Family members

For purposes of evaluating control, agencies and courts often assume that ownership or control held or exercised by family members and spouses should be

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[4] AS 04.11.045

[5] AS 04.11.370, 3 AAC 304.180.

attributed to the person in question, on the principle that family members will stick together if there is a dispute.[6]

In the case of the Licensee, two family members (Member B and Member C) currently hold 56% of the membership and constitute two-thirds of the managers. Through attributing the ownership and control of family members, Member B and Member C each already hold a controlling interest in the Licensee. Therefore, it cannot be the case that they will receive a controlling interest from Member A or that Member A will transfer a controlling interest to them.

If interests held by family members are attributed to members then Member B and Member C each would be treated as holding 56% before the sale so staff's rule of thumb #2 and #3 would not apply.

Redemption alternative

Although the transaction is currently structured as a sale by Member A of his membership interest in the Licensee proportionally to Member B and Member C, the transaction could be changed. Rather than selling his membership interest, the Licensee could redeem Member A's membership interest. His membership interest in the Licensee would be cancelled. This would be a transaction between the Licensee and Member A. Member B and Member C would not be parties to the redemption transaction. No membership interest would be transferred to them by Member A or anyone else, and no membership interest would be received by them from Member A or anyone else. Therefore, the redemption would not result in receipt or transfer of a controlling interest.

Since this structuring of the transaction would not be receipt or transfer of a controlling interest and since it would result in the same functional result as a sale by Member A to Member B and Member C, there is no reason to treat the sale by Member A as a transfer of a controlling interest.

Multiple members

Although not the situation presented by the Licensee, Ms. McConnell's memorandum describes the situation of a licensee having several shareholders, none of whom own a majority interest. According to Ms. McConnell, transfers among these

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[6] For example, the Marijuana Control Board has defined "controlling interest" to include less than 50% of ownership or control if a person and family members jointly exert actual control. 3 AAC 306.990(a)(14). State regulations specifying information that must be disclosed in proxy solicitations require that information be included about family members. See 3 AAC 08.345.

shareholders could be a transfer of a controlling interest, under rule #3, even if no shareholder owns a majority interest.

This interpretation is nonsensical. If a 10% shareholder sells his shares to another 10% shareholder, the shareholder now holding 20% still does not have a controlling interest. In the scenario described by Ms. McConnell in her memorandum, could anyone really think the transfer of 1% by Person 1 (a 26% shareholder) to a 4% shareholder is a transfer of a controlling interest? When no shareholder had a controlling interest before the transfer and no shareholder has a controlling interest after the transfer, it is a perversion of AS 04.11.040 to conclude there has been a transfer of a controlling interest. There may be a "change" of control, as defined by the staff, but there would be no transfer of a controlling interest.

Ms. McConnell expressed that if the board did not have to approve transfers among 10% shareholders that do not result in transfer of a controlling interest, this would not achieve the intent of Title 4 to give the board authority to review and approve ownership and control of licenses.

Again, Ms. McConnell misinterprets Title 4. Material changes in ownership and management, whether or not there is a transfer of a controlling interest, have to be reported to the board.[7] If the board does not consider the change to be in the best interests of the public, it has the authority to suspend or terminate the license.[8] The board always has the authority to approve ownership and control of licensees through its power to suspend or terminate licenses. The board does not need to exercise its authority under the transfer-of-controlling-interest statute to achieve the objective described by Ms. McConnell.

Type of board approval

According to Ms. McConnell, if there is a change of controlling interest, staff considers this a transfer of the license and the licensee needs to go through the process to apply for board approval of a transfer. As with staff's focus on "change of controlling interest," the staff's view of the consequences of a transfer of controlling interest also is inaccurate.

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[7] AS 4.11.045-.055

[8] AS 04.11.370, 3 AAC 304.180.

AS 04.11.040 does not say that transfer or receipt of a controlling interest constitutes a transfer of a license. It simply says that transfer or receipt of a controlling interest requires consent of the board.[9]

The board or staff could establish a process and standards for consenting to transfer of a controlling interest in a licensee that differ from the extensive process and standards Title 4 establishes for transfer of a license. Title 4 does not establish any process or standards for consenting to transfer of a controlling interest. It does not require transfer of a controlling interest to be treated as equivalent to transfer of a license.

If Member A's transfer to Member B and Member C is a transfer of a controlling interest, then in the circumstances presented – when the continuing members of the licensee are already 10% members, when the continuing managers of the licensee are already managers, when no one who is not a current 10% member or manager will become a 10% member or manager, and when the continuing members and managers are family members – it would be appropriate for the board to establish a simplified method for approving the transfer of a controlling interest that is less extensive than approving transfer of the license.

Goals

Ms. McConnell describes the goal of the staff interpretation as allowing the board to see and approve the individuals who will control the license.

The Licensee agrees that the board should have full visibility of the ownership and management of licensees and the ability to act if it does not approve the ownership or management of licensees.

Any transfer of 10% or more of a membership interest in a limited liability company must be reported to the board. Any change in managers also has to be reported.[10]

With the goal of increasing transparency and board supervision of ownership and management of licensees, it would make more sense not to focus on controlling interest but for the board to adopt regulations that provide that when a notice of a change of 10%

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[9] 3 AAC 304.175 says that if there is a transfer of a controlling interest the transferee has to provide the same information as an applicant for a new license. But, neither Title 4 nor this regulation addresses how the board will consent to the transfer of a controlling interest.

[10] AS 04.11.045. Similar reporting is required of corporations and partnerships by AS 04.11.050 and AS 04.11.055.

owner or manager is given under AS 04.11.045-.055, any 10% owner or manager who had not previously provided personal information to the board must provide personal information. The board's regulations do not presently require this. If a 20% owner transfers his 20% interest to a new person, that would not trigger board review based on transfer of a controlling interest, but the board should have information about the new 20% owner. Then, if the board has concerns about the new 20% owner, the board has authority to review the ownership and, in an appropriate case, suspend or revoke the license under AS 04.11.370 and 3 AAC 304.180.

Why this matters

The Licensee believes it is sufficient, in the circumstances presented by the Licensee, for the Licensee to give notice to the board of the change of ownership and management. With the notice, the board will have full knowledge of the change. If staff needs additional information from the members and managers, staff can request that information. If staff has concerns about the members or managers, staff can investigate. If staff concludes that the members and managers make the Licensee unfit to hold a license, staff can bring the matter to the attention of the board and the board can take such action as it considers appropriate to suspend or revoke the license.

Treating transfer by Member A to Member B and Member C as an application for a new license introduces burdens and risks completely out of scale to the regulatory benefit. The Licensee would need to submit an application, together with all supporting documents (affidavits, certificates, statements, fingerprint cards, premises diagram, etc.). The Licensee would need to post the application, and incur the expense and effort of advertising the application. The Licensee would need to pay an application fee. Perhaps most inconvenient, notwithstanding that the Licensee will continue in business without interruption or change, the Licensee may have to list all taxes and debts and provide proof that all taxes and debts have been paid or collect waivers from its trade creditors.[11]

Others would be burdened, too. Notice of the application would be sent to the local governing body. There will be effort for the local governing body to consider the notice and delay while the local governing body considers the notice. There is the possibility that the local governing body might protest the "transfer" of the license, even though there is no practical change in the licensed operations. There is the possibility that the public might file objections.

Staff would spend time reviewing the application, notifying and communicating with the local governing body and interested members of the public, notifying creditors,

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[11] AS 04.11.360(4)

and preparing a recommendation to the board. The board would spend time reviewing and acting on the staff recommendation.

Once a simple transfer of ownership among members is treated as a transfer of a license, expenses and burdens will result and unknown consequences can arise.

This is a lot of effort and expense – by the Licensee, by the local governing body, by staff and by the board – respecting a transaction that does not materially change who owns or manages the Licensee.

Regulations

For the reasons described above, staff's interpretation is incorrect and inadequate.

Informal, unpublished support by the board for the staff's interpretation, as requested by Ms. McConnell, or alternatives described above should be established by regulation. Otherwise there is no means for licensees to know what standards may apply to their business dealings. Future staff may change their interpretation without notice to licensees. Also, the regulatory process provides an opportunity for licensees and other interested persons to express their views on the merits of a proposed interpretation. That is absent when this important issue is governed only by an unwritten staff interpretation.