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Joshua Bowman - Liquor license transfers in the context of hotel purchases and sales

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One issue that frequently complicates an otherwise straightforward hotel purchase and sale transaction is the liquor license transfer. In this article, I will explain some of the reasons why liquor license transfers are so tricky, and offer some tips for avoiding common mistakes.

Here are some of the reasons why liquor license transfers are so tricky. Absent any federal issues (which are extremely rare), liquor license transfers are governed by state law, with each state having its own unique and continuously shifting set of laws and regulations. In addition, some states, like Massachusetts, utilize a dual system of authority whereby each municipality also holds the right to enact additional ordinances or bylaws governing such transfers.

Given that alcoholic beverage control laws tend to be political hot potatoes, many of these laws and regulations are often old, vaguely worded and difficult to modify. The results are laws and regulations that are subject to frequent changes in regulatory and judicial interpretations. In addition, agency personnel are often elected officials or governmental appointees who change based on which way the political winds blow. Such agency personnel usually have substantial discretion over transfer applications, and may deny an application that is prepared identically to an application that sailed through the approval process a week prior, for no apparent reason.

With the above challenges in mind, what follows are five tips for avoiding common pitfalls associated with the liquor license transfer process in the context of a hotel purchase and sale:

1. The purchaser should confirm that the license is part of the transaction and will be conveyed free and clear at closing. Sellers sometimes make a side deal to sell licenses to third parties and/or pledge licenses as collateral for unrelated debts. It is also common for a license to be controlled by an affiliated or unaffiliated tenant or management company at the hotel. If the tenant or management company is unaffiliated with the seller, the buyer should understand that it will be difficult or impossible to include the license with the hotel purchase and sale. If, on the other hand, the licensee is an affiliate of the seller, the affiliate should agree in writing to transfer the license to the buyer (subject to appropriate terms and conditions).
2. The purchaser should be careful to engage the right qualified specialist to "run point" on the liquor license transfer process. While some purchasers will want to engage a non-attorney expediter, I usually recommend engaging an attorney for this role because the professional standards that attorneys are subject to usually leads to a better result. However, a purchaser should not assume that any hospitality attorney can handle any liquor license transfer in any given town or state. An attorney who might be the right person to handle a transfer in one city or town may not be the right person to handle a transfer somewhere else. Even in a jurisdiction that is familiar to the attorney, if a governmental authority has changed its personnel, a licensing attorney who trades on his or her "connections" may no longer have the same level of influence.

3. The purchaser should quickly determine the amount of time the transfer will require and the level of cooperation (if any) that will be expected from the transferee. Ideally, the liquor license transfer would occur on the closing date. But that is not always possible. If the closing will occur before the transfer is completed, the parties need to understand if an Interim Operating Agreement (IOA) between the buyer and seller is permitted under applicable law (and what terms and conditions will be included in such IOA). In jurisdictions where IOAs are prohibited (like Connecticut), the parties must come up with other workable solutions (which, in Connecticut, would be obtaining a provisional license prior to closing). In addition, if applicable law requires the other transaction party to sign any documents related to the transfer, such forms should be expressly referenced by name in the purchase and sale agreement.

4. The purchaser should quickly figure out the best structure for holding the liquor license after the transfer. If a special purpose entity is to be created to hold the license, an organizational chart should be drafted as soon as possible so that everyone involved with the transaction can understand the ownership structure. Thus, transfer applications and loan applications may be completed correctly, questions from investors and their attorneys will be minimized, and time and money will be saved.

5. The purchaser and seller should quickly determine the extent to which a license may affect the allocation of value of the assets being transferred. While coming up with allocations is usually the job of the parties' accountants, and parties are able to submit different allocations to the IRS for the same assets, I usually encourage the parties to use the same numbers on IRS Form 8594 to avoid raising any red flags with the IRS. In a state or town where liquor licenses are readily available, a liquor license may have little or no effect on the allocation of value in a hotel purchase and sale. However, an all alcoholic license in the Back Bay of Boston with a fair market value of over \$300,000 is a different story. In such circumstances, the sooner the deal parties agree upon an allocation of value, the better.

While it is not possible to completely eliminate the possibility that a license transfer will gum up the works of an otherwise smooth transaction, I hope that the above tips will help minimize that risk as much as possible.

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