

24 Business Opportunities

The statutory merger of the real estate and business opportunity licenses occurred in 1966. Since then, a real estate license is required to engage as an agent in the sale or lease of business opportunities.

Definition

The Real Estate Law defines “business opportunity” as the sale or lease of the business and goodwill of an existing business enterprise or opportunity.

The sale of a business opportunity may involve the sale of only personal property. Typical transactions involve retail stores, automotive service businesses, restaurants, cocktail lounges, bakeries, manufacturing facilities, distribution and services businesses, etc. The sale almost always includes the inventory, fixtures, non-competition agreement, lease assignment, and goodwill. If real property is involved in the sale, the agent usually treats the sale of the business and sale of the land/building as two separate and concurrent transactions with two concurrent and contingent escrows.

Agency

In most business opportunity transactions, the real estate licensee will be acting as a dual agent, with the informed consent of the principals. Thus, the licensee is in a fiduciary relationship with both the buyer and seller.

The real estate broker must obtain the written authorization of the owner of the business property before he or she may obtain the signature of a prospective buyer on a procuring cause agreement. Failure to do so is grounds for revocation or suspension of the agent’s license under Business and Professions Code Section 10176(j).

Small Businesses and the Small Business Administration

The Small Business Administration (SBA), a federal agency, assists small businesses through various financial and counseling programs. In establishing loan qualifying criteria, the SBA has developed *size* standards governing eligibility. Depending on the type of business (manufacturing, wholesaling, retailing, service, construction, or agriculture), the standard of eligibility is based either on the number of employees or on the annual gross sales of the business. Interested persons should contact the SBA for current criteria, loan amounts, etc.

Form of Business Organization

Legal and tax considerations generally enter into a buyer’s decision regarding the legal form of business organization. Sole proprietorship, corporation, partnership, limited liability company, syndicate, and franchise are examples.

It is estimated that about 75% of American businesses operate as sole proprietorships. About 16% are corporations. However, corporate enterprises earn over 70% of the total income.

The sole proprietorship is the simplest form of business opportunity. Corporations are governed by officers, directors, and shareholders (owners), and the business is conducted under authority of its articles of incorporation, bylaws, resolutions and policies. Organizers must comply with the legal requirements of the state in which the corporation is established.

Form of Sale

The usual form of transfer for small businesses is a sale of assets for individual owners and a sale of assets or stock when a corporate owner is involved. (Transfer of partnership interests, corporate mergers, etc., are other examples of forms of sale.) Tax factors often influence the form of sale.

The transfer of ownership of a corporate small business by sale of all corporation stock may require that the agent negotiating the sale have a broker-dealer securities license issued by either the California Department of Corporations or the Securities and Exchange Commission. However, a real estate broker who has a listing for the sale of the *assets* of a corporation is entitled to a commission if the parties decide on the sale of the stock in the corporation, provided it is a sale of all of the outstanding stock. Regarding the sale of stock of a corporation, see Section 260.204.1 of the California Code of Regulations.

In a sale of assets, a buyer assumes no obligations of the business unless by specific agreement. The seller's liabilities and creditors' claims are generally cleared up in escrow. In a sale of stock, with the parties intending that the corporation remain the owner of the business with the same assets and liabilities as before the sale, the shareholders of the corporation sell and assign their stock to the new shareholders.

Why an Escrow?

The use of an escrow holder specializing in business bulk transfers is advisable for all business opportunity transactions. It is the escrow holder's responsibility to insure that both the obligations and benefits of the Bulk Sales Law (Commercial Code Section 6101, et seq.) and, if applicable, the Secured Transactions statutes (Commercial Code Section 9101, et seq.) concerning personal property transfers and security devices have been met and/or obtained.

Pursuant to the written instructions of the principals, the escrow holder:

- conducts lien searches;
- publishes, records, and mails to the tax collector the appropriate Notice(s) to Creditors of Bulk Transfer;
- obtains the designated tax releases from the government agencies who could otherwise impose successor tax liability upon the buyer; and,
- acts as a general "clearing house" depository for funds, documents, instruments and delivery of same at close of escrow, at which time the escrow holder provides an accounting.

(It should be noted that the Internal Revenue Service does not give tax clearances. In some sections of California, a tax lien insurance policy is available to protect a buyer against a future or undisclosed tax lien.)

Buyer's Evaluation

A buyer should be given an opportunity to evaluate all material aspects of the seller's business, including:

- liens and liabilities that affect the business (because of possible successor liability);
- the lease terms and conditions;
- the recent past and the present financial history of the business;
- the present and probable future risks involved with ownership; and,
- the probable future income stream (assuming effective management by buyer)

Although the buyer has a responsibility to exercise "due diligence" in evaluating the business opportunity, the agent should advise the buyer to seek the advice of a competent accountant and attorney.

Motives of Buyers and Sellers

Most purchasers expect to buy a business with either a good earnings record or a good earnings potential. Few people buy businesses with heavy loss records or at the price of assuming the seller's obligations. While real property always retains some value, a defunct business has little or no value. A broker must exercise reasonable care in screening potential buyers and keep in mind the seller's motives in selling and the buyer's motives in buying.

A seller's motives might include: retirement; burnout; poor health; a move to another city; imminent bankruptcy; or a desire to quit business and work for others. A buyer's motives could include: wants to be boss; desires more income; lacks skills or training for employment; retiring to a second career; buying "a dream"; or expanding an existing on-going business.

Counseling the Buyer

A broker may be asked to counsel a business opportunity buyer. Particular care should be taken to ensure that counseling statements are not construed as legal advice or as representations or warranties concerning the future of a specific business.

Normally, the broker and prospective buyer discuss the buyer's background and whether he/she has experience in the business being investigated. Other important topics include:

1. the amount of money the buyer can invest, including the money necessary for start-up costs, (beginning inventory, deposits with utilities, licenses and permits, lease payment, advertising, etc.);

2. where additional funds, if needed, may be borrowed;
3. credit extensions that can be expected from suppliers;
4. the opinions of any accountant, attorney, or banker who has consulted with the buyer and whether or not the broker will be coordinating the purchase with them;
5. the reasonableness of the buyer's net income expectations;
6. the possibility of unexpected expenses or losses; and,
7. the likelihood that the current financial statement (balance sheet) and earnings statement (profit and loss) of the business and the buyer's financial statement will be adequate to obtain a direct loan from a bank or a loan through the SBA.

Especially with a novice buyer, the broker should anticipate being questioned in detail about all phases of owning the subject business.

A broker should be aware of the taxable events involved as a result of a transfer of a business. Particular care should be taken to ensure that counseling statements are not taken as legal or tax advice. The principals in the transaction should further be advised to seek legal and tax advice.

A new tax law went into effect January 2000 which adversely affects the seller who takes a note for part of the purchase price of the business. It applies to an asset sale as opposed to a corporate sale and where one is on the accrual method of accounting. The new law in general provides that the total dollar amount of the note to the seller is taxable all at once, even if the proceeds are to be received in installments over several years. This is a drastic change from previous law. It is incumbent on the licensee to direct the seller to discuss this matter with his or her accountant at the time of the listing. The new law may affect each taxpayer differently, depending upon their tax situation.

Additionally, in the sale of assets of a business, great care must be taken on how to allocate the consideration, i.e.; furniture, fixtures, equipment, non-compete agreement, goodwill, inventory, consulting agreements, lease, leasehold interests, employment contracts. The allocation of the items may have important tax consequences for the parties.

Satisfying Government Agencies

The broker should also be prepared to inform the purchaser of the various federal, state and local governmental agencies which the purchaser should contact for required permits, licenses, and clearances. Such agencies include:

- Internal Revenue Service (for employer identification number in connection with federal withholding taxes, etc.);
- State Board of Equalization (for sales tax permit, bond and sales tax deposit);
- State Department of Benefit Payments (state payroll tax withholding);
- State Department of Industrial Relations (workers' compensation insurance and California Occupational Safety and Health Act); and
- County and Municipal Agencies (licenses and permits, such as the business license).

Listings

Listings should be taken with great care after evaluating the business location, operation and the seller's records and financial statements (profit and loss statements, balance sheets and business tax statements for at least the last three years). The seller, or seller's accountant or attorney, should cooperate in furnishing the broker with income and expense records and copies of leases, insurance policies, inventory records for resale items, equipment, furniture, sales tax reports, IRS schedules, etc., so that the agent can evaluate the quality of the business and its income stream to arrive at a fair market price and listing terms with the seller. A seller is often cautious about disclosing books and records to a buyer since a prospective purchaser could be a competitor or person not acting in good faith. If there is great resistance by the seller in accepting the broker's evaluation of a fair and realistic sales price and if reasonable value is not represented in the seller's demand for a higher listing price and terms, the listing should probably be turned down.

After the agent has reviewed the seller's basic records and evaluated the other aspects of the business, the broker and owner determine the listing price and terms to meet the owner's selling objectives.

In negotiating a listing, the licensee must remember the responsibility for making a full disclosure of and accurately detailing all information material to the business being sold - furnished by the seller. Where shares of stock are involved, the law imposes a duty upon the broker to verify, within certain limitations, the accuracy and completeness of such information. This obligation is referred to as the duty of due diligence. Therefore, the owner's motive for selling is important. If the owner isn't making a success of the business and appears to be distorting or manipulating records, or "padding" statements to the broker, the broker must point out that failure to accurately disclose material facts concerning the business or "padding" of statements are material misrepresentations constituting fraud. The broker must not participate in such a transaction.

Preparing the Listing

The sale of a business opportunity should begin with an exclusive authorization to sell agreement, adequately and properly completed by the agent. Often with the advice of attorneys, experienced brokers and their associations have devised forms which serve as a checklist to avoid overlooking essential provisions for the protection of the parties. The broker should make sure that the form used applies to the transaction at hand, or amend the form. Specialized forms are the general rule.

The licensee is encouraged to utilize the Business Disclosure Statement (C.A.R. Form BDS). It is an important tool to assist in establishing the listing price, a disclosure of material facts regarding the operation of the Business and a proposal of items to be included in or excluded from the offering of the Business for sale; the BDS's relation to the purchase agreement; and the owner's warranty of the accuracy of the information provided and that the owner has good and marketable title to the Business and personal property being offered for sale. The BDS has provisions for the owner to provide the financial information for the most recent year-to-date and the preceding three years.

Most authorizations to sell will provide room for a good deal more information about the property than would be necessary in listing a residence. The authorization may well contain:

- conditions and terms under which the business will be sold;
- duration of listing extensions;
- financing;
- how and when the business can be shown;
- name and address of seller's accountant;
- pending citations, if any, from government agencies against the business and/or owner that would prevent the selling or transferring of any licenses and/or permits;
- health and welfare and paid vacation provisions, etc., for employees, if there is a union contract in force;
- legality of any structural changes made (check to see if all necessary permits have been issued, final inspections made and jobs approved);
- days (and hours) of the week business is open or closed;
- number of employees;
- square footage of business area and parking area;
- dba of business, if any, and whether it is properly registered;
- name of the business if it is to be included as consideration;
- gross income and average per month; and,
- list of average expenses per month.

The Business Listing Agreement (C.A.R. Form BLA) provides for an exclusive listing for the subject Business and incorporates the following:

- ***Business Disclosure Statement.*** Which establishes the purpose of the BDS, the relationship of the BDS to the purchase agreement and the owner's warranty.

- **Documentation.** The owner shall provide to the broker items marked on the Form such as inventory, furniture and fixtures, customer lists, schedule of accounts receivable, goodwill and customer deposits, etc.
- **Real Property.** If real property is to be included in the sale, a separate real property listing agreement is required.
- **Terms of Sale.** The listed sales price and any additional terms
- **Compensation to Broker.** Establishes the licensee's compensation for the sale of the Business.
- **Business Escrow and Appraisal.** If checked, the parties agree to use a Business escrow and the owner will pay for a qualified Business appraisal.
- **Multiple Listing Service.** The information provided will be provided to the MLS.
- **Title.** Owner represents owner has good and marketable title to the Business and personal property being offered for sale.
- **Owner Representations.** The owner represents, unless otherwise specified in writing, that owner is unaware of any Notices of Default recorded against the Business or any delinquent amounts due under any loans secured by the Business, any pending or proposed special assessments or any pending or threatened action which may affect the Business or the owner's ability to transfer it.
- **Broker's and Owner's Duties.** Broker agrees to exercise reasonable efforts and use due diligence in marketing the property. The owner agrees to provide all written disclosures, maintain liability and property insurance on the Business and to indemnify the broker.
- **Agency Relationships.** Discloses that the broker may represent more than one Buyer and shall, as soon as practicable, disclose to the owner any election to act as a dual agent. Owner understands that broker may have or obtain listings on other Businesses that potential Buyers may consider, or make offers on, or purchase through broker.
- **Dispute Resolution.** The owner and broker agree to mediate any dispute arising out of the listing agreement or any resulting transaction before resorting to arbitration or court action. If the owner and broker initial the Mediation of Disputes paragraph, then they agree to arbitration subject to the exclusions contained within the agreement.

A business opportunity broker must ensure that all representations concerning a business are those of the owner or seller. A broker may be liable for any personal representations or projections that he or she makes.

The agent must inform the seller that the seller must have all equipment purchased and used in the operation of the business in working order on the day the buyer takes possession, unless the listing agreement and purchase agreement provide otherwise. It is also the seller's responsibility to see that necessary clearances from governmental agencies are secured. The seller should understand clearly that any sale will be subject to the buyer receiving all required licenses, permits and clearances.

When sales and/or social security and unemployment taxes are involved in the transaction, the agent must remind the seller (and see that the purchase agreement provides) that no funds are to be released to seller from escrow until such time as seller has provided the escrow holder clearances from the State Board of Equalization and the Department of Benefit Payments. Remember, the buyer can be held responsible for the unpaid taxes of buyer's predecessor ("successor's tax liability") up to the amount buyer paid to purchase the business. Sales tax must also be paid on the fixtures and furniture. The tax must be paid by the buyer to the seller, and the state will collect it from the seller, normally through escrow.

The seller must also be apprised that the buyer will have the right to inspect the business records of income and expense and in most cases will make the offer to purchase contingent upon the later inspection and approval of the records. The seller should also be informed of escrow costs and of any other fees the seller will be expected to pay. In most cases, the seller and buyer share the closing costs equally.

Establishing Value

There is no magic formula for estimating the equitable "saleable price" of a business. Some brokers draw from their own experience and ability to understand business accounting and devise initial price guides. These should be used only as rough guides.

When a broker has developed a price guide for use as a starting point in listing negotiations, the broker will find out by market comparison and careful examination of economic data that market prices of like businesses in the

same general area vary considerably. Some of the factors making for this variation are differences in location, net earnings, hours of operation of the business, terms and conditions of lease, number of employees, etc. Other major factors in adjusting any price guide are the age, appearance and usefulness of furniture, fixtures and equipment, and the exterior and interior physical appearance of the business.

To arrive at an estimate of value, a business opportunity agent will examine the following:

1. Operating statements and business tax statements for the last three years. Sometimes a formal reconstruction of the records may be necessary to arrive at an "adjusted net profit." The adjusted net profit may reflect certain discretionary expenses which a new owner may not have.
2. Intangible assets being purchased, including goodwill, location, fictitious business name (dba), and the seller's covenant not to compete.
3. Aspects of the lease: renewable or extendible on reasonable terms; new lease or assignment; lessor's consent.
4. Financing: availability; suitability of assets (including real property, if applicable) as security for a bank or other loan.
5. The business opportunity's compliance with all applicable laws and regulations.
6. Employees; insurance; hours of operation needed to produce income; management problems; labor costs.
7. Zoning; parking; pedestrian and vehicular access; compatibility of neighboring businesses; square footage/future expansion possibilities.
8. Current ratio of operating expenses to gross income; seller's return on investment; seller's current assets, liabilities, and cash flow; consistency of profitability.
9. Comparison with similar businesses being offered for sale.
10. Written appraisal report from expert, if necessary.

Note that it is inevitable that there will be differences of opinion as to the appraised value of a business opportunity. The appraisal of a business opportunity is difficult because of the wide diversity of types of businesses and the fact that the amount of "goodwill" is difficult to quantify.

Some brokers become value specialists in their own right in specific types of business opportunities.

The final appraised value will be the best coordination of (1) the quality of the business investment and (2) the current market price for that type of business opportunity. Where the business is large and complex, the agent should advise the seller to have it appraised by a reputable specialist.

Valuation Methods

A number of valuation methods and statistical models exist for estimating the value of a business. Two common methods are: (1) capitalizing value based on estimated annual profit and the desired rate of return of the investment; and (2) evaluating the fixed assets and inventory being purchased.

A business opportunity broker who prepares a pro forma budget or statement of projected income should be aware that these documents may be construed as a representation or warranty. The broker may be held liable to the buyer for such statements. A business opportunity broker should deal only with the factual, historic operation of a business as reflected in existing records, and avoid any representations concerning future income.

Lease

If there is a lease involved, what is its status? Will the landlord permit the present lease to be assigned, and, if so, under what terms and conditions? Is a sublease possible and preferable to a new lease? If the present lease has only a few years left, is a new lease for a longer term possible and under what terms and conditions? Will the lessor demand payment of a bonus for a new lease and, if so, who will pay it? What is the lessor's name and address and who is to be held responsible for dealing with the lessor regarding a new lease or the transferring or extension of the present lease? If it is a percentage lease, how is the payment and accounting of same to be handled? The buyer should reimburse the seller through escrow for any prepaid rent and/or security money on

the lease. The broker should carefully read any lease which is part of the transaction, and note all pertinent facts therein before quoting what broker believes to be facts to a buyer. It is likely that the buyer will need competent legal advice in this regard.

Goodwill

The goodwill of a business has monetary value, which the law protects. Goodwill is the expectation of continued public patronage.

Some factors to be considered in establishing a value for goodwill are:

1. History of sales and profits with greater weight given to the most current figures.
2. Length of time a business has been established in its present location.
3. Location and whether or not, with a few changes, the volume of business can be increased.
4. The present and protected future situation regarding competition. If a business has a location or license which amounts to a monopoly, it is possible to obtain a premium for goodwill. (As to a liquor license, there may be a limit on the valuation of goodwill.)
5. Purchase of the business name. If the name has become well known and has a good reputation for quality, service, dependability, etc., the goodwill value of the name is a definite asset and should be reflected in the price.
6. The seller's agreement not to compete, within legal limitations.
7. The characteristics of the business in reference to customer traffic (both foot and automobile), repeat business, and personality/ability of the owner and key personnel.

Fictitious Business Name

Not later than 40 days after commencing business in California under a fictitious business name, a business entity is required to file a fictitious business name statement with the county clerk in the county where the principal place of business is located (or with the Clerk of Sacramento County if there is no place of business located in this state).

Under the provisions of Section 17900 of the Business and Professions Code, a fictitious business name is one which does not include the surname of the individual or suggests the existence of additional owners. A partnership (or other association of persons) name that does not include the surname of each general partner or suggests the existence of additional owners is fictitious. In the case of a corporation, any name other than the one stated in the Articles of Incorporation is also considered fictitious. Names that suggest the existence of additional owners include such words as "Company," "& Company," "& Son," "& Sons," "& Associates," and "Brothers."

Within 30 days after a fictitious business name statement has been filed it must be published once a week for four successive weeks in a newspaper of general circulation in the county where the principal place of business is located. Where a new statement is required because the prior statement has expired, the new statement need not be published unless there has been a change in the information required in the expired statement.

An affidavit showing the publication of the statement shall be filed with the county clerk within 30 days after the completion of the publication.

A fictitious business name statement expires at the end of five years from December 31 of the year in which it was filed in the office of the county clerk, unless, prior to its expiration, a statement of abandonment of the fictitious business name described in the statement has been filed.

Franchising

Franchising is a business plan under which a business firm (franchisor) agrees to provide a purchaser-investor (franchisee) the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed by the franchisor, for a franchise fee.

Franchising allows investors to benefit from the expert management, assistance, special training, and marketing and promotional know-how of the franchisor while being self-employed.

A few examples of franchises are food service operations, hotels and motels, convenience stores, and drug stores.

There are many risks to consider in purchasing a franchise. Many poorly conceived, inefficient, noncompetitive, product-deficient franchisors have failed.

The Franchise Investment Law (Section 31000, et seq. of the Corporations Code) is designed to provide a prospective purchaser with full and adequate disclosure of all material terms of the franchise agreement. These disclosures will be contained in an offering prospectus which must be delivered to a prospective purchaser at least 10 business days prior to the effect of any binding franchise agreement, or at least 10 business days before the receipt of any consideration, whichever occurs first. To find out if a franchise is registered in California, call the California Department of Corporations Index Section.

The three categories of persons authorized to sell franchises under Section 31210 of the Corporations Code are:

1. A person identified in an application registered with the Commissioner of Corporations for an offering of a franchise in California.
2. A person licensed as a real estate broker or a real estate salesperson.
3. A person licensed by the Commissioner of Corporations as a broker-dealer or agent under the Corporate Securities Law of 1968.

Thus, a real estate broker, real estate salesperson, broker-dealer or agent can sell franchise interests without being identified in the registration application, while a person identified in the registration application can sell the franchise interest even though not licensed as a real estate broker, real estate salesperson, broker-dealer or agent.

Before becoming involved in franchising, a real estate licensee should possess a professional knowledge of the entire system and be familiar with the type of problems likely to be encountered by an owner of a franchise business.

BULK SALES AND THE UNIFORM COMMERCIAL CODE

Division 6 of the Uniform Commercial Code (UCC) pertains to bulk sales. A bulk sale is a sale, not in the ordinary course of the seller's business, of more than half of the seller's inventory and equipment (as measured by *value* on the date of the bulk sale agreement).

Public Notice

When the owner of an enterprise whose principal business is the sale of merchandise desires to effect a bulk sale, the buyer must give public notice to the seller's creditors by:

1. recordation of a notice in the Office of the County Recorder (of the county or counties in which the property to be sold is located) at least 12 business days before the bulk sale is to be consummated, or the sale, if by auction, is to commence;
2. publication of the notice at least once in a newspaper of general circulation published in the judicial district in which the property is located and in the judicial district in which the chief executive office of the seller, or, if the chief executive office is not in California, the principal business office in California, is located, if in either case there is one, and if there is none, then in a newspaper of general circulation in the county embracing such judicial district. Notice must be published at least 12 business days before the bulk sale is to be consummated or the sale by auction is to be commenced.
3. sending a copy of the notice by registered or certified mail at least 12 business days before the bulk sale is to be consummated or the sale by auction is to be commenced to the county tax collector in the county or counties in which the property to be transferred is located.

The notice to creditors shall state:

- that a bulk sale will be made;

- the names and business addresses of the seller and, except in the case of a sale at auction, the buyer, and all other business names and addresses used by the seller within the last three years so far as known to the buyer;
- the location and general description of the property to be sold;
- the place, and the date on or after which the bulk sale is to be consummated; and,
- whether or not the bulk sale is subject to UCC Section 6106.2 (consideration is \$2,000,000 or less, substantially all cash or cash plus an obligation to pay the balance in the future), and, if so, the information required by subdivision (f) of Section 6106.2 (the name and address of the person with whom claims may be filed and the last date claims may be filed, which is the last business day before the date of the bulk sale).

Sale at Public Auction

If the sale will be at a public auction, the notice must also state that fact, the name of the auctioneer, and the time and place of the auction.

Escrows

In any case where a bulk sales notice subject to the requirements of Division 6 of the Uniform Commercial Code provides for an escrow, the transferee (buyer) must deposit the full purchase price or consideration (not necessarily cash) with the escrow holder. If there is no escrow, then the transferee must apply the consideration as required by law.

If the seller disputes any filed creditor's claim, the escrow holder will withhold the amount of the claim and notify the creditor. The creditor has 25 days from the mailing of the notice to attach the funds. If not attached, escrow holder pays the funds to the seller, or to other creditors.

If, at the time for closing the escrow, the amount of money deposited is insufficient to pay in full all creditors' claims, the escrow holder must delay the closing, give notice to the creditors of the deficiency within the specified time limit, and distribute the cash consideration and any installment payments in strict compliance with the priorities established by law.

Escrow may not make any payments for fees and commissions prior to closing.

Effect of Noncompliance

The principal purpose of the bulk transfer law is to afford the creditors of a business an opportunity to satisfy their claims before the owner can sell the assets and vanish with the proceeds.

When the statutory filing and publication requirements are not met, the buyer is liable to creditors who hold valid claims based on transactions or events occurring before the bulk transfer. Creditors must take action within one year of the date of transfer of possession to satisfy their claims, unless the transfer was concealed, in which case action may be brought within one year after its discovery by the creditor.

In an auction sale, the auctioneer is responsible for giving the statutory notice. If an auction sale does not comply with the statutory requirements, the auctioneer becomes personally liable to the transferor's creditors for the sums owed to them by the debtor.

The provisions of Division 6 of the Uniform Commercial Code do not apply to certain transactions, including: transfers made to create or modify a security interest; assignments for the benefit of all the transferor's creditors; sale by executors, administrators, receivers, trustees in bankruptcy or any public officer under judicial process; or transfer of property exempt from execution.

Compliance with Division 6 does not exclude compliance with other applicable statutes, such as the transfer of liquor licenses under the Alcoholic Beverage Control Act (Business and Professions Code, Sections 23000, et seq.) and the Uniform Fraudulent Transfer Act (Civil Code Sections 3439, et seq.).

Uniform Commercial Code (Division 9)

Division 9 of the UCC (entitled "Secured Transactions, Sales of Accounts, Contract Rights and Chattel Paper") establishes a unified and comprehensive scheme for regulation of security transactions in *personal property* and

fixtures, superseding statutes on chattel mortgages, conditional sales, trust receipts, assignment of accounts receivable and others in this field.

Division 9 applies to a transaction in any form which is intended to create a security interest in personal property.

There are a number of transactions excepted from this coverage. It is not applicable to real property security transactions, although a security interest in an obligation secured by real property (a note secured by real property pledged to secure another note) is covered.

A transaction subject to Division 9 might also be subject to one or more of the following:

1. The Unruh Act (retail installment sales - Civil Code Sections 1801, et seq.);
2. Automobile Sales Finance Act (Civil Code, 2981, et seq.);
3. Industrial Loan Law (Financial Code, 18000, et seq.);
4. Pawnbroker Law (Financial Code, 21000, et seq.);
5. Personal Property Brokers Law (Financial Code, 22000, et seq.); and
6. Consumer Finance Lenders Law (Financial Code, 24000, et seq.).

The UCC provides for a simplified filing system by means of a “financing statement” to perfect security interests provided for under the code. Local filing in the county recorder’s office is permitted only for specific types of transactions. In all other cases, financing statements (Form UCC-1) are to be filed with the Secretary of State. See also Chapter 14.

CALIFORNIA SALES AND USE TAX PROVISIONS

The Sales and Use Tax Law is relevant to the transfer of a retail business which sells tangible personal property. Of particular importance are:

- a “clearance receipt” confirming payment of state and local sales taxes so that the buyer is protected from “successor’s liability”;
- releases or subordination agreements covering sales tax liens against real or personal property; and,
- the tax liability on that portion of the sale price allocated to the personal property to be used in the business.

Successor’s Liability

In the sale of a business opportunity or stock of goods, the buyer must hold back enough of the selling price to cover any outstanding tax liability.

The successor’s liability extends to taxes incurred with reference to the operation of the business by the or any former owner.

The purchaser of the business or stock of goods will be released from further obligation to withhold funds from the purchase price if he obtains a certificate from the Board of Equalization stating that no taxes, interest, or penalties are due from the seller or any previous owner.

The liability is enforced by service of a notice of successor liability. The successor may petition the Board of Equalization for reconsideration of the liability.

ALCOHOLIC BEVERAGE CONTROL ACT

The sale of a business involving an alcoholic beverage license is a specialty all to itself and is subject to laws which are constantly being changed.

Regulation

Pursuant to the Alcoholic Beverage Control Act (the ACT - Division 9 of the Business and Professions Code), the Department of Alcoholic Beverage Control (ABC) issues licenses authorizing the sale of alcoholic

beverages. The ABC has the authority, for good cause, to deny, suspend or revoke an alcoholic beverage license.

The ABC issues alcoholic beverage licenses to qualified adult persons, partnerships, and corporations for use at approved locations. The ABC investigates each applicant and may refuse to issue a license to any person who has violated the Act, has a disqualifying criminal record, or attempts to conceal an arrest record. The location may be disapproved if it is in the immediate vicinity of a school, church, or public playground or if there is an over-concentration of alcoholic beverage licenses in the area or if licensure may create or aggravate a police problem. Most ABC application investigations take approximately 45 - 60 days.

A license issued for a specific location must be placed in use within 30 days of the date of issuance. If the premises are still under construction, the ABC will hold the license in safekeeping for not more than 6 months unless cause for further delay can be established.

Transfer of License - Posting of Notice

Like an applicant for license issuance, an applicant for transfer of a license must post the premises with a notice of application to sell alcoholic beverages. Local officials and private parties may protest the proposed transfer and the license cannot be transferred while a valid protest is pending or on appeal. Further, the ABC may decline to transfer a license if disciplinary action is pending against the transferor.

No one should make any investment upon the assumption that an alcoholic beverage license will be transferred. An applicant for license transfer may be able to obtain a temporary operating permit. However, it may not be prudent for the seller to give possession of the business for operation under a temporary permit.

Notice to County Recorder and Escrow Requirement

Before filing a license transfer application with the ABC, the applicant and current licensee must file a notice of intended transfer with the county recorder and establish an escrow. Escrow may not release any consideration before the ABC approves transfer of the license. Then, transfer of the business will occur simultaneously with transfer of the license.

THE BUSINESS PURCHASE AGREEMENT

The licensee is encouraged, whenever possible, to use the Business Purchase Agreement and Joint Escrow Instructions (C.A.R. Form BPA). While similar in content and language to the California Residential Purchase Agreement and Joint Escrow Instructions (C.A.R. Form RPA-CA), the Form contains language unique to the sale of a Business opportunity (See chapter 22).

Significant differences in the Form include:

- ***Payment of Purchase Price.*** Provides provisions for new loans on any real property included in the Business sale and also has provisions for loans secured by Business assets. The loan will be evidenced by a note in favor of the Seller together with a security agreement covering all assets of the Business and a UCC-1 to be filed with the Secretary of State.
- ***Assets Transferred.*** Provides that the Buyer is purchasing all assets of the Business with the exception of cash or cash equivalents and any excluded assets as denoted.
- ***Liabilities Transferred.*** Establishes the Buyer is not purchasing any of the liabilities of the Business other than those noted.
- ***Inventory.*** If checked, Seller typically has 7 days to provide the Buyer with an inventory list. The Buyer has the right to confirm the inventory up to 5 days prior to the close of escrow.
- ***Seller Disclosure; Buyer Investigation.*** Specifies the Seller, generally within 7 days, will provide Buyer the lists of items or documents checked and made a part of the contract. This can include such items as inventory, government licenses and permits, schedule of accounts receivable, Business appraisal, sales tax returns for specified years, federal and state tax returns, etc. The Seller also represents that the books and records provided are those maintained in the ordinary course of Business and the state and federal tax returns are those filed with the applicable government agencies.
- ***Consulting and Training.*** Contains provisions for the Seller to consult with and train the Buyer for a specified time as agreed to in the contract.

- **Agreement Not To Compete.** If checked, the Seller agrees not to compete with the Buyer in any Business the same as, or substantially similar to the Business for a time and distance from as specified in the contract.
- **Lease.** Specifies the Sale is contingent upon the Buyer obtaining an assignment, a new lease or sublease for the Business.
- **Purchase of Real Property.** If checked, the sale is contingent upon the Buyer's ability to purchase the real property in which the Business operates. A separate Real Property Purchase Agreement is required, such as the Commercial Property Purchase Agreement and Joint Escrow Instructions (C.A.R. Form CPA).
- **Licenses.** The sale is contingent upon the transfer or obtaining of any licenses needed to operate the Business.
- **Franchise.** If the Business is a Franchise, the sale is contingent upon the Buyer's acceptance of the terms of the Franchise and the Franchisor's acceptance of the Buyer.
- **Bulk Transfer.** The seller agrees to comply with Bulk Sales provision of Division 6 of the Uniform Commercial Code.
- **Agency.** The provisions of Civil Code 2079 relating to Agency do not apply to a Business Opportunity sale. However, it is a violation of Business and Professions Code Section 10176(d) for a licensee to represent more than one party in a transaction without the knowledge or consent of all parties. This section of the contract establishes the Buyer and Seller acknowledge receipt of a disclosure that the licensee may be acting for more than one Buyer or Seller and provides for a Confirmation of the agency elected for the transaction.

Licensees should be aware of the importance, in those transactions where the sale is being secured with the personal property of the business, of having the UCC-1 filed with the Secretary of State. Just as the Deed of Trust provides the security and collateral for the promissory note in a loan secured by real property; the UCC-1, when filed, gives notice to the world that there is an interest (lien) in personal property of the business. In order to fully protect the lender's interest the UCC-1, which is only a notice and not an agreement, must be accompanied by a promissory note and a security agreement covering all assets of the business.