

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 42.12.208 pertaining to)
temporary operating authority for)
alcoholic beverage license applicants)

TO: All Concerned Persons

1. On September 10, 2021, the Department of Revenue published MAR Notice No. 42-1037 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1132 of the 2021 Montana Administrative Register, Issue Number 17.

2. On October 4, 2021, a public hearing was held to consider the proposed amendment. No proponents were present, no proponent oral testimony was received, and the department received no written comments in support. The following opponent was present and provided oral testimony: Shauna Helfert, Gaming Industry Association of Montana (GIA). The following persons also provided written comments in opposition: John Iverson, Montana Tavern Association (MTA); Michael Lawlor, attorney, Lawlor & Co., PLLC; and Brad Griffin, Montana Restaurant Association (MRA).

3. The department has amended ARM 42.12.208 as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: Ms. Helfert commented that the proposed amendments represent an impediment to small business, through processing or delays, when the licensee opts to change license types at the same location.

RESPONSE 1: Section 16-4-404(6), MCA, is clear in its conditions for the grant of temporary operating authority: the department may permit a qualified purchaser to operate the business to be transferred pending final approval if (1) there has not been a change in location and (2) the application for transfer has been filed with the department.

Based on the clear language of 16-4-404(6), MCA, license transactions like Ms. Helfert describes in Comment 1 should not include the grant of temporary operating authority because they are license-only transactions. There is no bona fide sale of a business and no qualified purchaser who is operating the business during the application process. Further, a licensee is entitled to operate under its existing alcoholic beverages license while the second license is going through the application and approval process. The department believes any potential

impediment or delay is not attributable to whether temporary operating authority was granted.

COMMENT 2: Similar to Comment 1, Ms. Helfert commented her belief that the review of the rule and this rulemaking came out of the Governor's Red Tape Relief Initiative and that the removal of ARM 42.12.208(1) would actually cause an increase of "red tape" for Montana's small businesses. Ms. Helfert provided other examples of licensing transactions which are variations of the type described in Comment 1.

RESPONSE 2: This rulemaking did not come out of the department's implementation of the Governor's Red Tape Relief Initiative. The department observed license transaction patterns and compliance issues involving the issuance of temporary operating authority under the conditions in current ARM 42.12.208(1), adopted under MAR Notice No. 42-2-921 (2014), which prompted a review of the rule and 16-4-404, MCA. The department concluded the 2014 amendments to ARM 42.12.208(1) allow the issuance of temporary operating authority in license transactions which exceed those authorized under 16-4-404(6), MCA, and are contrary to the then-proposed rule's statement of reasonable necessity, which sought to ". . . improve clarity regarding when a licensee may be issued temporary operating authority." The department cannot continue this contradictory application of department discretion and issue temporary operating authority on those grounds.

In response to license transaction variations similar to those in Comment 1, the department directs Ms. Helfert to the second paragraph of Response 1 and that the potential for procedural "red tape" to an applicant is not based on the issuance of temporary operating authority because that authority is granted at the discretion of the department and is not the end result of the licensing process.

As to Ms. Helfert's other claims of inequity between existing licensees and their license change transactions versus a (new) purchaser and who may be granted temporary operating authority, the department again responds that Ms. Helfert's complaints are not with the department's rules but with the licensing statutes. The department asserts that general statutory license transfer requirements and the temporary operating authority constraints of 16-4-404(6), MCA, are known and must be factored by an applicant when engaging in the licensing process. The proper forum for any expanded scope of temporary operating authority is the Montana Legislature.

COMMENT 3: Ms. Helfert commented that current ARM 42.12.208(1) has been in force for seven years, that prior department administration presumably followed proper procedure and Montana laws in the promulgation of MAR Notice No. 42-2-921, and that the department is making the temporary operating authority process more cumbersome, which is contradictory to the GIA's perception of the policy goals of the current executive administration. Ms. Helfert added that there is enough ambiguity in 16-4-404, MCA, to sustain ARM 42.12.208(1) provisions with no known problems and that GIA interprets 16-4-404(6), MCA, with an emphasis that temporary operating authority may be granted "to operate the business" where the department is interpreting the law in the narrowest of views.

Similarly to Ms. Helfert, Mr. Iverson commented that the MTA questions whether this rule change is necessary. The existing rules appear to have been in place since 2014, and the MTA is not aware of any issues that the current rules have created. This proposal appears to be a solution in search of a problem.

Mr. Griffin also commented as to the longevity of the existing provisions in ARM 42.12.208(1) and opined that the department has ample discretion, by statute, to allow a business to operate the business pending the final approval if there is no change in location.

Mr. Lawlor commented similarly and contends the expanded authority of the department to grant temporary operating authority is positive. Mr. Lawlor also invokes the name of Ms. Helfert, as the former administrator for the department's Alcoholic Beverage Control Division, for the 2014 rulemaking as being correct. Mr. Lawlor draws upon his 2014 comments to MAR Notice No. 42-2-921 which encouraged the adoption of the amendments as a logical extension of temporary operating authority even when the license issued to the purchaser is technically a new, "original" license.

RESPONSE 3: The department understands all commenters' concerns that the amendments represent a change in department practice that has been in place - formally - since 2014, but the department reasserts that ARM 42.12.208(1) is not in concert with its implementing citation. The basis for this rulemaking is not only correct, but is also justified in the department's statement of reasonable necessity and Responses 1 and 2.

As to Ms. Helfert's ambiguity comment and Mr. Griffin's opinion about department discretion, the department again responds that 16-4-404(6), MCA, is clear, but is narrow in scope. Administrative rules are not meant to utilize ambiguity or expand agency discretion from the statutory purpose established by the Montana Legislature. The department cannot ignore legal conflict between statute and its administrative rules even when the result of the conflict is, in the commenters' eyes, positive.

The department struggles to thoroughly answer Mr. Iverson's comments that the department's "solution is in search of a problem" because the comments express an opinion, lack substance, and do not refute the department's statement of reasonable necessity and legal basis for the rulemaking. The department reiterates that it has observed license transaction patterns and compliance issues involving the issuance of temporary operating authority under the conditions in current ARM 42.12.208(1) which prompted a review of the rule and 16-4-404, MCA, but this response is not the appropriate place to disclose the situations and facts with a necessary level of detail. The department is willing to discuss those compliance matters with the MTA and Mr. Iverson should they be interested.

Notwithstanding Mr. Lawlor's opinion of Ms. Helfert's administration of the rulemaking under MAR Notice No. 42-2-921 that resulted in the amendments to ARM 42.12.208(1), the "logical extension" of department authority may facially appear as appropriate and the results positive, but logical extension when it is not legally supported by the implementing statute for the rule is not the basis for sound regulatory development. And Mr. Lawlor's 2014 comments are not operative because the department did not endorse his belief and made no statement that it

was the intent of the rule to expand the availability of temporary operating authority beyond the plain language of the statute.

COMMENT 4: Mr. Lawlor comments that the department has suddenly changed its mind, which is statutorily unnecessary and procedurally improper; it is also detrimental to businesses.

RESPONSE 4: As a general response, the department directs Mr. Lawlor to Responses 1 through 3.

As to the department's "suddenness" of the decision, the department contends the action was not sudden in its determination or how it was implemented, which was described in Response 2. Further, the department continued temporary operating authority for the affected license applicants until their respective license applications were either approved or withdrawn. Beginning in August 2021, and in cases where the issuance of temporary operating authority did not meet the license transfer parameters of 16-4-404(6), MCA, the department declined the issuance of temporary operating authority based on the legal determination, this rulemaking, and in compliance with 16-4-404, MCA.

In response to Mr. Lawlor's comment about the department being required to wait for the "legally required MAPA process," the department's grant of temporary operating authority is discretionary and can be approved or disapproved by the department during any license application process based on a myriad of circumstances, the most fundamental of which is whether the applicant's business transaction and license application meet the clear language of 16-4-404(6), MCA, and ARM 42.12.208. As for this rulemaking, the department has processed this notice, the required public hearing and comment process, and the adoption of the rule as proposed all in substantial compliance with MAPA.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State February 1, 2022.