



Oregon State Lottery

RULEMAKING UPDATE

DATE: January 22, 2020

TO: Oregon State Lottery Commissioners

FROM: Kris Skaro, Rules and Policy Analyst

RE: Rulemaking Update re OAR 177-040-0017, "Additional Video Lottery Retailer Application Requirements and Lottery Authority to Prevent and Resolve Concentrations"

As discussed at the October 2019 Commission Work Session, Lottery has a rule that is invalid on a technicality (failure to deliver a copy of the rule to Legislative Counsel within ten days of adoption in 2017.) This rule is important because it gives the Lottery the authority to enforce the casino and concentration prohibitions as described below.

Therefore, the Director recommends filing a Notice of Proposed Rulemaking to solicit public comment on an updated **draft** of the rule as summarized below so the Commission can consider readopting this rule in early 2020.

As amended, OAR 177-040-0017 would do four things:

1. State Lottery's **commitment to only place Video Lottery game terminals in viable businesses** consistent with the Oregon Constitution's prohibition on casinos as interpreted by the Oregon Supreme Court in *Ecumenical Ministries v. Lottery* and Lottery's casino prohibition rule.
2. To enforce the casino prohibition, **allow Lottery to require a Video Lottery retailer applicant to demonstrate business viability** for up to six months *only when* the Lottery has business viability concerns.
3. Allow Lottery to **prevent concentrations** ("concentration" means more than 3 to 6 Video Lottery retailers in a strip mall, depending on how many retail spaces/store fronts the strip mall has) when multiple pending applications would, if all were approved, create a concentration. Lottery will consider the application received first in time first.
4. Allow Lottery to **resolve concentrations** in the unlikely event that one occurs. The director must select locations that must close/relocate/terminate their contract based on **last-in first out** (unless an owner has more than one location involved in the concentration, in which case, the director may consult with the owner to select which location must close/relocate/terminate their contract.)

See also attached draft rule text showing changes. Final text is also attached for ease of reading.

Note the rule text is draft for the purpose of opening the public comment period. The Lottery is open to public comment, including from retailers and potential retailers, about other ways to meet the goals of the rule.

177-040-0017

Additional Video LotterySM Retailer ~~Business Operation Criteria and~~ Application Requirements and Lottery Authority to Prevent and Resolve Concentrations

(Amended 1/1/13)

- (1) General: It is the policy of the Oregon State Lottery to place Video LotterySM game terminals in retail businesses which are viable businesses on their own without benefit of selling Video LotterySM.
- (2) ~~90-Day Requirement: A person shall be considered for a Video LotterySM contract for a specified premises only if the business at that premises has been operating continuously for at least 90 days~~Continuous Operation: If the director or director's designee has reason to believe a Video Lottery retailer applicant is not a viable business and/or would not meet the casino prohibition criteria in OAR 177-040-0061(5) and (6), the director may require the applicant to operate their business continuously for up to six months prior to the date the application is accepted by the Lottery. Operating continuously means a business is open to the public and makes available for sale all products or services the applicant sells. For purposes of this definition, opening for brief periods of time and/or offering limited products and/or services will be considered an attempt to circumvent the intent of this section and will not be considered as operating continuously.
 - (a) Interruptions: The continuous ~~90-day~~ period of operation shall not be considered interrupted if any suspension of operations was for two days or less. The intent of this subsection is that there will not be a significant interruption of the business during the continuous ~~90-day~~ period of operation so that the Lottery may reasonably rely on sales information and business history which remains relevant to the application. The Director may find that the continuous ~~90-day~~ period of operation was not interrupted when the suspension of operation is for an aggregate of more than two business days upon a showing by the applicant that the sales information and business history remains relevant.
 - (b) Purchase: If the substantial assets of a business or premises were purchased by the person applying for a Video LotterySM retailer contract within 90 days prior to the date of the application, the period of operations under the prior owner shall be considered in determining the period of operations, provided that the new business is being operated as the same or similar type of business and the primary business of the prior owner was the offering of meals for on-premise consumption or alcoholic beverages for on-premise consumption. The intent of this rule section is to prevent evasion of the rule's requirement by means of superficial transactions such as the mere purchase of a business trade name rather than a bonafide acquisition of the substantial operating assets.
 - (c) Move: If a business moves to a different location within 90 days prior to the date of the application, the period of operations at the old location shall be considered if:
 - (A) The new location is in essentially the same community as the old location and serves essentially the same customer base; and

- (B) The business conducted at the new premises is a continuation of the business conducted at the old premises rather than the establishment of an additional location.
 - (C) The burden of proof for establishing subsections (A) and (B) of this subsection is on the applicant.
- (3) Selection Process Where Multiple Retailer Applications Would, If Approved, Create a Concentration of Video LotterySM Retailers: If Lottery receives two or more applications for a Video LotterySM retailer contract for premises at a location that would create a concentration of Video LotterySM retailers at the location, as defined in OAR 177-045-0000(1), and if more than one applicant were to qualify for a Video LotterySM retailer contract:
- (a) Lottery will first consider the application received first in time by date. If the applicant whose application is first in time does not ultimately qualify for a Video LotterySM retailer contract, Lottery will consider the application that was next received in time and will continue this process until an applicant qualifies for a Video LotterySM retailer contract at the location. Regardless of the number of Video LotterySM retailer applications submitted, Lottery will not enter into a Video LotterySM retailer contract if doing so would create a concentration of Video LotterySM retailers.
 - (b) If two or more applications are received on the same date, the applicant that contacted the Lottery Director will use a random selection process first to choose which initiate the application Lottery process will consider be considered first. If the applicant chosen considered first in the random selection does not ultimately qualify for a Video LotterySM retailer contract, the Lottery shall consider the application of the next applicant chosen during the random selection that contacted the Lottery first to initiate the application process. This process will continue until an applicant qualifies for a Video LotterySM retailer contract at the location. Regardless of the number of Video LotterySM retailer applications submitted, Lottery will not enter into a Video LotterySM retailer contract if doing so would create a concentration of Video LotterySM retailers.
- (~~4~~) Selection Process Where Concentration of Video Lottery Retailers Exists: For purposes of subsection (5) of OAR 177-045-0030, if there is a location of existing Video LotterySM retailers that creates a concentration of Video LotterySM retailers, the existing director must resolve the concentration as soon as possible by selecting retailer locations to either relocate or terminate their retail contract:
- (a) Except as provided in subsection (b) of this section, the director must select as many retailers at that as needed to relocate or terminate their retail contract based on last-in, first-out, meaning that the retailer locations with the most recently-approved retail contract will be required to relocate or terminate their retail contract to resolve the concentration.
 - (b) If a retailer location may submit an application to the Lottery, in a manner and by a date determined by the Lottery Director, for a Video LotterySM retailer contract at the selected under the last-in, first-out standard in subsection (a) of this section is owned by a person who owns other retailer locations in the concentration, the director may

~~consult with the owner when selecting which location must relocate or terminate their retail contract. No other applicants for a Video LotterySM retailer contract may apply for that location under this subsection. If the number of existing Video LotterySM retailer contract applicants for that location will create a concentration of Video LotterySM retailers beginning June 28, 2015, the Director will select by random selection, those existing retailers who will be considered for a Video LotterySM retailer contract at the location beginning June 28, 2015. If any existing Video LotterySM retailer contract applicant chosen by random selection does not qualify for or does not enter into a Video LotterySM retailer contract at that location, the Director will consider the application of the next existing Video LotterySM retailer contract applicant chosen during the random selection process. Regardless of the number of Video LotterySM retailer contract applications submitted by existing Video LotterySM retailers, Lottery will not enter into a Video LotterySM retailer contract if doing so would create a concentration of Video LotterySM retailers at the location beginning June 28, 2015.~~

- ~~(d) — The Director shall determine the procedures for the random selection process authorized by this section. The Director may conduct a manual or electronic drawing, or may use any other selection procedure as determined by the Director that ensures a random selection. The Assistant Director of Security shall be responsible for ensuring that any random selection process is conducted using appropriate standards to ensure the fairness and integrity of the process. Upon recommendation of the Assistant Director of Security, the Director may disregard the results of a random selection if it appears inconsistent with the purposes of this rule or is inconsistent with the fairness, integrity, security, or honesty of the Lottery. Any decision of the Director under this section is final.~~

Statutory/Other Authority: [ORS 461](#)

Statutes/Other Implemented: [ORS 461.215 & 461.217](#)

History:

LOTT 9-2012, f. 12-18-12, cert. ef. 1-1-13

LOTT 1-2009, f. 1-30-09, cert. ef. 2-1-09

LOTT 6-2008(Temp), f. 10-29-08, cert. ef. 11-1-08 thru 4-28-09

LOTT 1-2007, f. 1-21-07, cert. ef. 2-1-07

LOTT 20-2005, f. 12-21-05, cert. ef. 12-31-05

LOTT 9-2005(Temp), f. & cert. ef. 9-7-05 thru 3-5-06

LOTT 6-2000, f. 7-26-00, cert. ef. 8-1-00

177-040-0017

Additional Video Lottery Retailer Application Requirements and Lottery Authority to Prevent and Resolve Concentrations

- (1) General: It is the policy of the Oregon State Lottery to place Video Lottery game terminals in retail businesses which are viable businesses on their own without benefit of selling Video Lottery.
- (2) Continuous Operation: If the director or director's designee has reason to believe an applicant is not a viable business and/or would not meet the casino prohibition criteria in OAR 177-040-0061(5) and (6), the director may require the applicant to operate their business continuously for up to six months prior to the date the application is accepted by the Lottery. Operating continuously means a business is open to the public and makes available for sale all products or services the applicant sells. For purposes of this definition, opening for brief periods of time and/or offering limited products and/or services will be considered an attempt to circumvent the intent of this section and will not be considered as operating continuously.
 - (a) Interruptions: The continuous period of operation shall not be considered interrupted if any suspension of operations was for two days or less. The intent of this subsection is that there will not be a significant interruption of the business during the continuous period of operation so that the Lottery may reasonably rely on sales information and business history which remains relevant to the application. The Director may find that the continuous period of operation was not interrupted when the suspension of operation is for an aggregate of more than two business days upon a showing by the applicant that the sales information and business history remains relevant.
 - (b) Purchase: If the substantial assets of a business or premises were purchased by the person applying for a Video Lottery retailer contract within 90 days prior to the date of the application, the period of operations under the prior owner shall be considered in determining the period of operations, provided that the new business is being operated as the same or similar type of business and the primary business of the prior owner was the offering of meals for on-premise consumption or alcoholic beverages for on-premise consumption. The intent of this rule section is to prevent evasion of the rule's requirement by means of superficial transactions such as the mere purchase of a business trade name rather than a bonafide acquisition of the substantial operating assets.
 - (c) Move: If a business moves to a different location within 90 days prior to the date of the application, the period of operations at the old location shall be considered if:
 - (A) The new location is in essentially the same community as the old location and serves essentially the same customer base; and
 - (B) The business conducted at the new premises is a continuation of the business conducted at the old premises rather than the establishment of an additional location.

- (C) The burden of proof for establishing subsections (A) and (B) of this subsection is on the applicant.
- (3) Selection Process Where Multiple Retailer Applications Would, If Approved, Create a Concentration of Video Lottery Retailers: If Lottery receives two or more applications for a Video Lottery retailer contract for premises at a location that would create a concentration of Video Lottery retailers at the location, as defined in [OAR 177-045-0000\(1\)](#), if more than one applicant were to qualify for a Video Lottery retailer contract:
- (a) Lottery will first consider the application received first in time by date. If the applicant whose application is first in time does not ultimately qualify for a Video Lottery retailer contract, Lottery will consider the application that was next received in time and will continue this process until an applicant qualifies for a Video Lottery retailer contract at the location. Regardless of the number of Video Lottery retailer applications submitted, Lottery will not enter into a Video Lottery retailer contract if doing so would create a concentration of Video Lottery retailers.
 - (b) If two or more applications are received on the same date, the applicant that contacted the Lottery first to initiate the application process will be considered first. If the applicant considered first does not ultimately qualify for a Video Lottery retailer contract, the Lottery shall consider the application of the next applicant that contacted the Lottery first to initiate the application process. This process will continue until an applicant qualifies for a Video Lottery retailer contract at the location. Regardless of the number of Video Lottery retailer applications submitted, Lottery will not enter into a Video Lottery retailer contract if doing so would create a concentration of Video Lottery retailers.
- (4) Selection Process Where Concentration of Video Lottery Retailers Exists: For purposes of subsection (5) of [OAR 177-045-0030](#), if there is a location of existing Video Lottery retailers that creates a concentration of Video Lottery retailers, the director must resolve the concentration as soon as possible by selecting retailer locations to either relocate or terminate their retail contract:
- (a) Except as provided in subsection (b) of this section, the director must select as many retailers as needed to relocate or terminate their retail contract based on **last-in, first-out**, meaning that the retailer locations with the most recently-approved retail contract will be required to relocate or terminate their retail contract to resolve the concentration.
 - (b) If a retailer location selected under the last-in, first-out standard in subsection (a) of this section is owned by a person who owns other retailer locations in the concentration, the director may consult with the owner when selecting which location must relocate or terminate their retail contract.

Statutory/Other Authority: [OR Const. Art. XV § 4\(4\)\(a\)](#), [ORS 461.120](#), [461.217](#)

Statutes/Other Implemented: [OR Const. Art. XV § 4](#), [ORS 461.120](#), [461.200](#), [461.215](#), [461.217](#)