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Memo

Date: April 16, 2020

To: Oregon State Lottery Commissioners

From: Kris Skaro, rules and policy

Subject: Rule adoption re *additional Video application requirements (related to casino prohibition) and preventing/resolving concentrations*

The Commission will consider permanent adoption of OAR 177-040-0017 and 177-045-0030. This proposed rulemaking was presented at the January Commission meeting and has three purposes:

1. **Ensure the legal validity of OAR 177-040-0017:**
 - There is some question about whether this rule was properly filed several years back, so we are asking the Commission to readopt this rule to remove any doubt about the rule's legal status.
2. **Explain that the Lottery may impose additional requirements on some Video Lottery retailers:**
 - For background, under the Oregon Constitution, ORS 461.300, and other Lottery administrative rules, the Lottery may not place Video Lottery terminals in businesses that are "engaged exclusively" in selling Video Lottery. This is the so-called casino prohibition that is operationalized in the Casino Prohibition Rule (CPR, OAR 177-040-0060).
 - For many applicants, we do not have CPR concerns, and under this rule as presented here today, those applicants will be able to apply without the additional requirements described in this rule.
 - However, when the Lottery has CPR concerns, the rule explains that the Lottery may require an applicant to operate their business for up to six months before applying and/or provide additional documentation or explanation about their business plans, as needed to demonstrate the business will not be engaged exclusively in selling Video and can meet the criteria in our CPR.
 - This is fairly consistent with current practice.
3. **Explain how Lottery will prevent and resolve concentrations:**
 - This rulemaking does three things with respect to the concentration prohibition:
 - The effective date of the prohibition is deleted, because it is effective now and going forward at all times.
 - We explain that the Lottery will manage or limit applications in areas at risk for a concentration to avoid inadvertently creating a concentration.
 - In the event a concentration exists in the future, the Lottery will resolve the concentration on a last-in, first-out basis.

The Final Rulemaking Report is enclosed. It describes the rulemaking process and explains that **no public comment was received on these rules**. A summary of each rule is also provided, along with final rule text showing tracked changes.

The director has reviewed these rules and recommends adoption of these rules as they are reflected in these materials to be effective on May 1, 2020.

Please contact me or Director Pack with any questions about these rules.



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Rulemaking Report

Establishes additional Video Lottery application requirements and clarifies Lottery's authority with respect to concentrations

Notice of Proposed Rulemaking

Lottery filed a Notice of Proposed Rulemaking with the Secretary of State on March 5, 2020, indicating the Lottery proposes to amend and readopt OAR 177-040-0017 and amend OAR 177-045-0030 for the purpose of establishing additional Video Lottery retailer application requirements with respect to business viability and the casino prohibition and to clarify the Lottery's authority with respect to the concentration probation, specifically, that the Lottery may prevent concentrations by managing the application process as described in the rules and may resolve concentrations when one exists using the criteria and process described in the rules.

Amend: OAR 177-040-0017 – *Additional Video Lottery Retailer Application Requirements and Lottery Authority to Prevent and Resolve Concentrations*
OAR 177-045-0030 – *Video Lottery Terminals*

Rulemaking Timeline

- Record of Commission Communication:
 - 10/24/20 (work session; concept presented)
 - [1/30/20](#) (rule listed on Commission agenda; draft rule presented)
 - 3/6/20 (emailed Notice and proposed rules to Commission)
 - 4/24/20 (rules listed on Commission agenda; request Commission approve permanent adoption of rules)
- Filed Notice with Secretary of State: [3/5/20](#)
- Notice published in Secretary of State Bulletin: **April 1, 2020**
- Notice sent to Interested Parties (email): **3/6/20; 3/9/20; 4/1/20**
- Notice sent to Interested Parties (postal mail): **3/6/20; 4/1/20**
- Notice sent to Speaker and Senate President: **3/6/20; 4/1/20**
- Notice sent to Capitol Press: **3/6/20**
- Public Rulemaking Hearing: **4/15/20 @ 10 a.m.**
- End of Written Comment Period: **4/15/20 @ 5 p.m.**

Public Comment Opportunities and Summary

The Notice opened a **five-week written comment period until Wednesday, April 15, 2020 at 5 p.m.** **Lottery received no written comments.**

The Notice also announced a **public rulemaking hearing** to be held at Lottery headquarters in Salem, Oregon at 10 a.m. on Wednesday, April 15, 2020. (In light of public health emergency and Executive Order, the Lottery emailed interested parties and legislative contacts on April 1, 2020, with Zoom meeting participation information.)

Kris Skaro convened the hearing in person at Lottery headquarters in Salem, OR, and also via Zoom conference call at 10:10 a.m. on Wednesday, April 15, 2020. **No members of the public provided testimony at the hearing.** The hearing was adjourned at 10:38 a.m.

Director's Recommendation

The Director has reviewed the enclosed rules, which are like the proposed draft released in the notice, but edited to better reflect the additional Video application requirements and explain how the Lottery will manage the application process to prevent concentrations. In consideration of all public comment received, and input from Lottery personnel who are responsible for administering the casino and concentration prohibitions, **the Director recommends the Commission permanently adopt these rules as presented in this final rulemaking report, to be effective on May 1, 2020.**

Enclosures:

1. Draft Permanent Administrative Order pending Commission approval.
2. Final recommended rule text showing changes.

Attachments (to view, click paperclip icon on the left side of this PDF):

3. Notice of Proposed Rulemaking with original proposed rule text.
4. Report on Public Rulemaking Hearing.
5. Final rule text (with changes accepted.)

PERMANENT ADMINISTRATIVE ORDER

CHAPTER 177 OREGON STATE LOTTERY

FILING CAPTION: *Establishes additional Video Lottery application requirements and clarifies Lottery's authority with respect to concentrations*

EFFECTIVE DATE: 05/01/2020

AGENCY APPROVED DATE: *Pending Commission Approval*

CONTACT:

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RULES:

177-040-0017, 177-045-0030

AMEND: 177-040-0017

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

RULE SUMMARY: This rule about additional Video Lottery retailer application requirements and Lottery's authority to prevent and resolve concentrations is being readopted as amended to confirm the Lottery's commitment to only place Video Lottery game terminals in viable businesses and allow the Lottery to impose additional requirements on some Video Lottery retailer applicants when needed to ensure business viability and compliance with OAR 177-040-0061, the Casino Prohibition Rule (CPR). The rule also allows the Lottery to prevent concentrations (see OAR 177-045-0000 and 177-045-0030) by explaining how Video Lottery applications will be considered to prevent a concentration, and gives Lottery authority to resolve a concentration using the criteria in the rule.

This rule was previously filed by the Lottery to include similar provisions to those explained in this summary, but the rule filing did not comply with ORS 183.715 (as it existed before it was amended by SB 277 (2017)), and therefore, the Lottery is readopting the rule as amended in full compliance with the Administrative Procedures Act to ensure the rule has full legal force and effect.

AMEND: 177-045-0030

RULE TITLE: Video Lottery Game Terminals

RULE SUMMARY: The Lottery is amending this rule about Video Lottery game terminals to remove

the section explaining the effective date of the concentration prohibition. There are currently no concentrations in OAR 177-045-0000 and therefore the concentration prohibition in subsection (2)(g) is effective at all times going forward, and no effective date is needed.

177-040-0017

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

- (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 Additional Video Lottery Retail Application~~ Requirements: ~~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 prior to the date the application is accepted by the Lottery.~~
 - (a) If the director or director's designee has reason to believe an applicant is not a viable business without selling Video Lottery or would otherwise not meet the casino prohibition criteria in OAR 177-040-0061:
 - (A) The director or director's designee may require the applicant to operate the business continuously for up to six months prior to the date the application process is initiated.
 - (B) The director or director's designee may require additional documentation and explanation about the applicant's business operation plans such as, but not limited to, length of experience in the type of business, prior ownership and/or management of businesses in general, sales and profitability projections, and location suitability, as deemed necessary to evaluate the viability of the business.
 - (b) For the purpose of paragraph (a)(A) of this section, ~~o~~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.
 - (aA) 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.
 - (bB) 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 process is initiated, 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 ~~or alcoholic beverages 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 bona fide 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 process is initiated, the period of operations at the old location shall be considered if:

(~~A~~i) The new location is in essentially the same community as the old location and serves essentially the same customer base; and

(~~B~~ii) 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~~iii) The burden of proof for establishing subsections (A) and (B) of this subsection is on the applicant.

(3) Managing Video Lottery Retailer Applications to Prevent a Concentration: The Lottery will manage the Video Lottery retailer application process to avoid creating a concentration as defined in OAR 177-045-0000(1):

(a) The Lottery will not initiate the application process or consider or process an application when the application would, if approved, create a concentration.

(b) When there is an area at risk for a concentration, the Lottery will manage the application process such that no concentration is created. For example, the Lottery will only allow one application to be processed or considered at a time if more than one application would, if approved, create a concentration. In the event that more than one applicant has requested to initiate the application process, the Lottery will use a first come, first serve basis to select among applicants as needed to avoid creating a concentration.

(4) Selection Process Where Concentration of Video Lottery Retailers Exists: If there is a location of existing Video Lottery retailers that creates a concentration of Video Lottery retailers, the director must resolve the concentration 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.

~~(3) Selection Process Where 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 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 Lottery Director will use a random selection process to choose which application Lottery will consider first. If the applicant chosen 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 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.~~

~~(c) 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 retailers at that 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 location. 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: OR Const. Art. XV § 4(4)(a), ORS 461.120, 461.217, 461.300
Statutes/Other Implemented: OR Const. Art. XV § 4, ORS 461.120, 461.200, 461.215, & 461.217, 461.3010

177-045-0030

Video Lottery Game Terminals

(Amended ~~10/17/185/1/20~~)

- (1) Allocation of Terminals: In the exercise of the Director's discretion and subject to all other requirements, the Director may allocate and reallocate the Lottery's Video Lottery game terminals among Video Lottery retailers at any time and in any manner. The Director shall consider:
 - (a) Availability: The availability of the terminals and related equipment.
 - (b) Public Access: Adequate and convenient public access to Video Lottery games.
 - (c) Retailer Sales: The actual or projected net video sales generated from the play of Video Lottery games at each Video Lottery retail location. A new or existing Video Lottery retailer shall generate a minimum of \$200 in average net video sales per week per terminal as determined by the Director. The Lottery shall calculate the average using any 90-day or greater time period determined by the Lottery. Net video sales are calculated by subtracting prizes awarded on a Video Lottery game terminal from wagers placed on the terminal. The Director may remove one or more terminals from a retail location when the retailer is unable to meet the minimum sales requirement.
- (2) Additional Requirements: Placement of Video Lottery game terminals is subject to the following:
 - (a) Restricted Visibility: The Lottery will not place Video Lottery game terminals in an area of a business or premises that does not or will not have restricted visibility.
 - (b) Adjacent Businesses: When two or more adjacent businesses appear to the Director to be a single business, or are operated by the same or commingled ownership, then the Lottery may limit such businesses to the maximum number of Video Lottery game terminals permitted under Oregon law for one business as the total number of terminals authorized for both or more such businesses.
 - (c) Convenience Store or Grocery Store: The Lottery will not place Video Lottery game terminals in a business or in premises that operate or will operate primarily as a convenience store or grocery store.
 - (d) Smoking Environment: The Lottery will not place Video Lottery game terminals in an area of a business or premises that is a smoking environment or where people are or would be exposed to second hand smoke.
 - (e) Minor Posting: The Lottery will not place Video Lottery game terminals in an area of a business or premises that is not posted as prohibited to minors by the Oregon Liquor Control Commission.
 - (f) Businesses Not Normally Associated with the On-premise Consumption of Food and Alcoholic Beverages: The Lottery will not place Video Lottery game terminals in a business or premises that operates as a laundromat, movie theater, car dealership,

beauty salon, bed and breakfast lodging facility, hardware store, dry goods store, clothing store, liquor store, or any other business not normally associated with the on-premise consumption of food and alcoholic beverages.

- (g) Concentration of Video Lottery Retailers: The Lottery will not place Video Lottery game terminals in a business or premises if this would create a concentration of Video Lottery retailers.
- (h) Limit on the Number of Video Lottery Game Terminals: In the Director's sole discretion and subject to all other requirements, the Director may limit the number of Video Lottery game terminals in a Video Lottery retailer's business or premises at any time and in any manner.
- (3) Director's Decisions: The Director's decisions regarding allocation, removal, placement, or limiting the number of Video Lottery game terminals are final.
- (4) Reconsideration: Upon written request by a Video Lottery retailer, the Director may reconsider any Video Lottery game terminal allocation decision made under this rule pertaining to that retailer unless such decision is required by this rule.

~~(5) Date of Applicability: Except as otherwise provided or in the sole discretion of the Director, the provisions of subsection (2)(g) of this rule will be applied to all applications for a Video Lottery retailer contract received on or after April 1, 2012, and will apply to all existing Video Lottery retailers effective at 5:00 a.m. on June 28, 2015.~~

~~(a) For purposes of this section, "applications" include:~~

~~(A) An application to sell, lease, or otherwise dispose of some or all of the assets of the retailer's business or premises or transfer some or all of the ownership interest in the retailer's entity to another person by operation of law, stock purchase, consolidation, merger, or other reorganization of the retailer's business, except in the event of the owner or owners' death if the retailer is an entity that has a legal identity apart from its owner or owners;~~

~~(B) An application of any type by a retailer who is attempting to circumvent this section as determined by the Director in his sole discretion.~~

~~(b) If the retailer is an entity that has a legal identity apart from its owner or owners, and a transfer of 100% of its ownership interests occurs by operation of law because of the death of the owner or owners, the Director may, in his sole discretion, not apply this section to an application to sell, lease, or otherwise dispose of 100% of the assets of the retailer's business or premises or to transfer 100% of the ownership interest in the retailer's entity. This section will apply, however, to the retailer effective at 5:00 a.m. on June 28, 2015.~~

Statutory/Other Authority: ~~ORS 461 & OR Const. Art. XV & § Sec. 4(4)(a), ORS 461.120, 461.217, 461.260, 461.300~~

Statutes/Other Implemented: [OR Const. Art. XV § 4](#), [ORS 461.100, 461.150, 461.200, 461.120, 461.217,](#)
[& 461.300](#)

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