NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 177
OREGON STATE LOTTERY

FILING CAPTION: Establishing timeline for Lottery retailer to provide documentation that bank error caused non-sufficient funds

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 06/30/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Kris Skaro
971-719-0794
kris.skaro@lottery.oregon.gov

500 Airport Rd SE
Salem, OR 97301

Filed By:
Kris Skaro
Rules Coordinator

HEARING(S)
Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 06/15/2022
TIME: 10:00 AM - 11:00 AM
OFFICER: Kris Skaro
ADDRESS: Zoom (see Special Instructions)
N/A
Salem, OR 97302

SPECIAL INSTRUCTIONS:
The Oregon State Lottery Commissioners will not attend this hearing but will receive a summary of all written and in-person comment received and must consider all comment before considering adopting permanent rules.

Join the public rulemaking hearing at https://us06web.zoom.us/j/87087348521 or call 253-215-8782 and enter Meeting ID: 870 8734 8521. Contact Kris Skaro at kris.skaro@lottery.oregon.gov or 971-719-0794 if you have questions or need assistance submitting comment, including assistive technology.

NEED FOR THE RULE(S)
OAR 177-040-0052 explains the consequences for when a Lottery retailer’s electronic funds transfer (EFT) payment to the Lottery is not completed due to non-sufficient funds (NSF) in the retailer’s EFT account. Specifically, the rule distinguishes between a retailer’s first and second NSF and, additionally, OAR 177-040-0052 explains that if an NSF occurs because of a bank error, the NSF will not be treated as an NSF under the rule so long as the error is corrected and Lottery receives documentation form the financial institution indicating that the NSF occurred due to a bank error.

The problem with the rule is that it does not provide a timeframe by which documentation of a bank error must be received. In practice, a retailer may report that an NSF was caused by a bank error, but the retailer does not submit documentation to that effect before a second NSF occurs. This causes problems because the Lottery does not know if the subsequent NSF should be treated as a second NSF (which carries more severe consequences) or if the second NSF...
should be treated as the first NSF because, in fact, the first NSF was a bank error.

The Lottery has determined that adding a clear timeline to provide documentation of a bank error would provide clarity to both the Lottery and to retailers so that all parties are clear as to when documentation of a bank error should be provided. The Lottery has proposed a timeline of five working days to align with the timeline for other activities described in the rule. The Lottery is, however, open to comment during the public rulemaking process if a different timeline is more appropriate. Additionally, understanding that different circumstances may call for different timelines, the Lottery will continue to provide flexibility to retailers pursuant to section (9) of the rule, which allows the Director to approve an exception to any requirement in the rule, including the proposed bank error documentation deadline, provided the Director determines that the facts and circumstances warrant an exception.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Lottery relied upon the following documents when drafting the proposed rule change. They are available as provided below or upon request to Kris Skaro at Kris.skaro@lottery.oregon.gov or 503-540-1181:

- OAR chapter 177 available at https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=153.
- Retailer NSF statistics available upon request to the Lottery.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The Lottery does not believe adoption of the amendments to OAR 177-040-0052 will affect racial equity in Oregon. However, Lottery acknowledges some retailers may have more difficulty complying than others and has implemented safeguards to mitigate disparate impacts.

DISCUSSION:

The requirement to provide documentation within five working days will apply equally to all retailers, and Lottery also considers all exception requests equally on their merits. In these respects, the rule change should not have disparate impacts on different racial groups.

That being said, the Lottery does not collect racial demographic data about retailers, and this may obscure disparate impacts to some degree. The Lottery is considering collecting racial data in the future to allow Lottery to more meaningfully consider the racial equity effects of Lottery policies.

Even in the absence of racial demographic data about retailers, the Lottery knows that many Lottery retailers are individuals who have recently immigrated to the United States and for whom English is not their first or preferred language. Although language is not a direct correlation to race, it’s reasonable to assume some of these retailers may be members of minority racial groups. It’s also reasonable to assume that these retailers may have more trouble communicating with their financial institution (leading to bank errors in the first place), communicating with Lottery after an NSF occurs, and obtaining documentation from their financial institution. The Lottery plans to mitigate any disparate impacts by contacting each Lottery retailer that has an NSF. During these interactions, Lottery can evaluate whether the retailer may need assistance communicating with their financial institution and/or obtaining documentation of a bank error. Additionally, as noted above, the Lottery is considering requesting racial demographic
data from retailers in the future to improve Lottery's ability to more fully identify and mitigate any disparate racial impacts.

FISCAL AND ECONOMIC IMPACT:
The Lottery estimates that amending OAR 177-040-0052 will have no fiscal or economic impact on any state agencies, including the Lottery, units of local government, or members of the public. While many small businesses are subject to the rule, the Lottery estimates no costs of compliance for small businesses beyond what is currently required for retailers under current rules, laws, and the retailer contract. See the Lottery’s Cost of Compliance Statements below for more information.

COST OF COMPLIANCE:
(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Identify any state agencies, unit of local government, and members of the public likely to be economically affected by the rule(s).

The Lottery estimates no state agencies, including the Lottery, units of local government, or members of the public are likely to be economically affected by the rules.

Lottery retailers are subject to and affected by the rule; many retailers are small businesses. There are serious economic consequences in the rule for NSFs, such as paying a fee, paying a bond, having Lottery equipment disabled, and/or contract termination. However, Lottery does not expect any additional or new economic or fiscal impact to retailers as a result of the proposed amendments. Under the rule as amended, NSFs that occur because of bank errors will continue to not be treated as an NSF under the rule as long as documentation is provided. The only change is the requirement to provide documentation within a certain timeframe, which should not, in and of itself, impose any new economic impacts. Retailers who are unable to meet the timeline can request an exception.

(2) Effect on Small Businesses:
(a) Estimate the number and type of small businesses subject to the rule(s);

All Lottery retailers are subject to OAR 177-040-0052. There are currently 3,839 active Lottery retailers, which includes retailers who only sell traditional Lottery products, retailers who only sell Video Lottery games, and retailers who sell both traditional and Video Lottery products. Most Lottery retailers (but not all) are small businesses. (The Lottery does not have information needed to precisely estimate how many current Lottery retailers are small businesses as defined in ORS 183.310. For example, the Lottery does not know the number of employees each retailer has. However, Lottery retailers are typically business entities like bars, pubs, restaurants, taverns, small eateries, limited menu delis, bowling alleys, adult entertainment establishments, convenience stores, grocery stores, and gas stations. Some of these, such as large chain retailers and restaurants, are probably not small businesses as defined in ORS 183.310, but industry data suggests most of those business types will typically employ fewer than 50 employees. Therefore, Lottery estimates that most, but not all, of the 3,839 Lottery retailers are small businesses as defined in ORS 183.310 that are subject to this rule.)

Not all retailers will experience an NSF, but some do and will in the future. Since January 1, 2022, 54 retailers (out of
have experienced an NSF. Two of those were bank errors.

As noted, the type of small business subject to this rule are bars, pubs, restaurants, taverns, small eateries, limited menu delis, bowling alleys, adult entertainment establishments, convenience stores, grocery stores, and gas stations.

(b) Describe the expected reporting, recordkeeping, and administrative activities and cost required to comply with these rule(s);

OAR 177-040-0052 as currently adopted requires retailers to undertake various compliance activities in response to an NSF occurring with respect to their EFT to the Lottery, such as contacting Lottery to correct or explain the error, paying a fee, or, for some, paying a bond. The proposed amendments do not impose additional activities per se, but the proposed amendments do require that obtaining documentation of a bank error should be done promptly within the work week. (As noted, there is an exception process for unusual circumstances.) The purpose of the deadline is to provide clarity to the Lottery and the retailer so that if a second NSF occurs, it's clear whether the subsequent NSF should be treated as the first or second NSF. The Lottery thinks five working days is a reasonable amount of time. However, the Lottery requests public comment from small businesses and retailers if that is not a reasonable timeline to obtain documentation.

(c) Estimate the cost of professional services, equipment supplies, labor, and increased administration required to comply with the rule(s).

As noted above, OAR 177-040-0052 as currently adopted requires some administrative activities to comply with the rule in the event the retailer has an NSF, such as contacting the Lottery to correct or explain the error, paying a fee, or, for the second NSF, paying a bond. These are not changed by the proposed amendment, but documentation of a bank error would need to be provided within a timeframe, whereas the current rule is silent as to timeframe. The Lottery does not think the timeframe per se imposes additional costs of labor or increased administration, but the Lottery welcomes public comment from small businesses about whether complying with the proposed timeframe would impose additional costs on small businesses.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not involved in the development of the proposed rule change, but Lottery welcomes comment from small businesses, including Lottery retailers, during the public rulemaking process.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO   IF NOT, WHY NOT?

The Lottery seeks public comment during the public rulemaking process, especially from Lottery retailers. The Lottery will make efforts to make retailers aware of the proposed change. The Lottery believes adding a timeframe to provide documentation would provide more clarity to the Lottery and retailers as to whether a particular NSF will be treated as a bank error or not. The timeline is important in the event a subsequent NSF occurs. If that happens, and there remains uncertainty as to whether a previous NSF was a bank error, this creates confusion for the Lottery and the retailer. The Lottery believes five working days is sufficient to obtain documentation but, the Lottery welcomes public comment on this proposed rule change.

AMEND: 177-040-0052

RULE SUMMARY: OAR 177-040-0052 explains the consequences for when a Lottery retailer's electronic funds transfer (EFT) payment to the Lottery is not completed due to non-sufficient funds (NSF) in the retailer's EFT account. Specifically, the rule distinguishes between a retailer's first and second NSF and, additionally, OAR 177-040-0052
explains that if an NSF occurs because of a bank error, the NSF will not be treated as an NSF under the rule so long as
the error is corrected, and Lottery receives documentation from the financial institution indicating that the NSF
occurred due to a bank error.

The Lottery proposes to amend OAR 177-040-0052 to add a timeframe by which a retailer must submit documentation
of a bank error. This ensures the Lottery and the retailer know if an NSF will be treated as a bank error or a first NSF,
which is important if a subsequent NSF occurs. The Lottery may make additional or alternative changes in response to
public comment or information received during the rulemaking process.

The Lottery may also make non-substantive updates the rule to improve grammar, organization, clarity, and accuracy;
update terminology in a manner that does not change the meaning; and update the statutory authority and statutes
implemented section of the rule.

CHANGES TO RULE:

177-040-0052
Non-Sufficient Funds ¶

(1) Definitions: For purposes of this rule:
(a) "Working day" means a weekday (Monday through Friday) from 8 a.m. to 5 p.m. when Lottery Headquarters is
open for business.
(b) "NSF" means non-sufficient funds.

(2) Retailers with Temporary Contract or Letter of Authority: If an electronic funds transfer (EFT) from a retailer
with a temporary contract or a letter of authority issued under ORS 461.335 is not completed due to NSF in the
retailer's EFT account, and non-payment is not excused under this rule, the Lottery shall terminate the retailer’s
temporary contract or letter of authority, and disable or remove Lottery equipment from the retailer’s premises.
Processing of the retailer's application for a retailer contract otherwise may proceed.

(3) First NSF: The first time that a Lottery retailer's EFT payment to the Lottery is not completed due to NSF in the
retailer's EFT account, the Lottery shall:
(a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;
(b) Disable Equipment: Disable the Lottery's equipment on the retailer's premises for up to five working days, in
which time the retailer must pay, by certified funds, the EFT transfer amount plus an additional $50 fee for the
Lottery's administrative expenses in processing the NSF;
(c) Withhold Bonus: Withhold any bonus and incentive payments the retailer may have earned for the business
week in which the NSF occurs. If the retailer does not make the required payments within five working days of the
date the equipment was disabled, the retailer shall forfeit the bonus and incentive payments; and
(d) Terminate Contract: Terminate the retailer's contract and remove the Lottery's equipment if the retailer fails
to pay, by certified funds, the EFT transfer amount plus the $50 fee within five working days of the date the
equipment was disabled.

(4) Second NSF: When a retailer's EFT payment is not completed to the Lottery due to NSF in the retailer's EFT
account for a second time within 12 months of the retailer's first NSF, the Lottery shall:
(a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;
(b) Disable Equipment: Disable the Lottery's equipment on the retailer's premises for up to five working days, in
which time the retailer must pay, by certified funds, the EFT transfer amount plus an additional $50 fee for the
Lottery's administrative expenses in processing the NSF and post a bond or make a cash deposit;
(c) Withhold Bonus: Withhold any bonus and incentive payments the retailer may have earned for the business
week in which the NSF occurs. If the retailer does not make the required payments within five working days of the
date the equipment was disabled, the retailer shall forfeit the bonus and incentive payments; and
(d) Bond/Cash Deposit: The Lottery shall require the retailer to post:
(A) Cash: A cash deposit by certified funds; or
(B) Bond: A bond issued by a surety company or companies holding a certificate of authority to transact surety
business in the State of Oregon and approved by the Director. The Director shall determine the amount, the term,
and any other applicable conditions of the bond.
(C) The amount of the bond or cash deposit will be no less than twice the retailer's weekly average EFT transfers,
calculated using the immediately preceding three calendar months.
(D) The bond must remain in effect until the Lottery determines that it is no longer necessary. The Lottery will hold
the cash deposit until the Lottery determines that it is no longer necessary.¶
(e) If the retailer fails to pay, by certified funds, the EFT transfer amount plus the $50 fee within five working days of the date the equipment was disabled, or fails to post a bond or make a cash deposit within five working days of the date the equipment was disabled the retailer contract shall be terminated. ¶
(5) Subsequent NSF: When a Lottery retailer’s EFT payment is not completed to the Lottery due to NSF in the retailer’s EFT account more than twice within 12 months of the retailer’s first NSF, the Lottery shall:
(a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;¶
(b) Disable Equipment: Disable the Lottery’s equipment on the retailer’s premises for up to five working days, in which time the retailer must pay, by certified funds, the EFT transfer amount plus an additional $50 fee for the Lottery’s administrative expenses processing the NSF;¶
(c) Forfeit Bonus: Require the retailer to forfeit any bonus and incentive payments the retailer may have earned for the business week in which the NSF occurs; and¶
(d) Terminate Contract: Terminate the retailer’s lottery contract and remove the Lottery’s equipment if the retailer fails to pay, by certified funds, the EFT transfer amount plus the $50 fee within five working days of the date the equipment was disabled.¶
(6) NSF Due to Financial Institution Error: Any NSF that is due to an error committed by the retailer’s financial institution will not be treated as a NSF under this rule as long as the error is corrected and Lottery receives documentation within five working days from the NSF from the retailer’s financial institution. The financial institution must substantiate to the Director’s satisfaction the financial institution’s responsibility for causing the NSF, and that but for the financial institution’s error, sufficient funds would have been available in the retailer’s account to cover the EFT payment.¶
(7) Financial Institution Closures: Any NSF that is due to an unexpected temporary closure of the retailer’s financial institution will not be treated as a NSF under this rule as long as the NSF is corrected and Lottery receives documentation within five working days from the NSF from the retailer’s financial institution that substantiates to the Director’s satisfaction the reason for the financial institution’s unexpected closure. The retailer shall make the deposit before 5 p.m. of the next day the financial institution is open or available for deposits to be made. If the deposit is not made as described, the Lottery shall treat it as an NSF under these rules.¶
(8) Retailer’s Obligations Survive Contract Termination: Termination of the retailer’s contract does not release the retailer from any obligation to pay all amounts due the Lottery under this rule and the retailer’s Lottery contract. The Lottery may make a claim upon any bond, or cash deposit posted under this rule, and apply the money to any of the retailer’s obligations owed to the Lottery. The Lottery may initiate collection action on behalf of the State to collect all amounts due.¶
(9) Director’s Discretion: The Director may make exceptions to these requirements based upon the facts and circumstances of any particular payment by a retailer which is rejected for NSF.
Statutory/Other Authority: ORS 461 & OR Const., Art. XV, Sec. 4(4)¶ 4(4)(a), ORS 461.120, 461.130, 461.150, 461.300
Statutes/Other Implemented: ORS 461r Const. Art XV, 4(4), ORS 461.120, 461.130, 461.150, 461.300