Memo

Date:	May 12, 2023
To:	Oregon State Lottery Commissioners
From:	Kris Skaro, rules and policy analyst
Subject:	Inform re OAR 177-040-0052 (Retailer NSF)

Background:

Each week, the Lottery does an electronic funds transfer (EFT) from each Lottery retailer in which any moneys owed to Lottery based on sales are swept less any commissions, bonuses, or other credits owed to the retailer. Each week, there are about 5 or 6 retailers whose EFT is returned for non-sufficient funds (NSF). (For context, there are about 3,900 retailers, meaning most retailers do not experience NSF in any given week.)

When an NSF occurs, OAR 177-040-0052 applies, which explains the consequences for NSF. OAR 177-040-0052 does not allow contract termination for multiple NSFs so long as the retailer pays the amount due plus a $50 fee and posts a bond that is no less than twice the retailer's weekly average EFT transfers. (A previous version of the rule required contract termination after three NSFs, but the rule was amended in 2018 to allow multiple NSFs.)

A small number of retailers have repeated NSFs during the year. Repeated NSFs create significant administrative work for the Lottery, including contacting the retailer, disabling equipment, securing payment to cover the EFT, etc. Repeated NSFs also raise concern that these retailers are not demonstrating financial responsibility, which is expected of Lottery retailers under ORS 461.300.

Proposed Rulemaking:

Lottery is proposing to amend the rule to allow contract termination when a retailer's weekly EFT is returned for non-sufficient funds (NSF) four times in a 12-month period. NSFs that are caused by a bank error will continue to be excused under the rule. Additionally, the director retains the authority to make exceptions when circumstances warrant.

Next Steps/Enclosures:

The Lottery plans to notify all current retailers about the proposed change. I will report back to you on any comment received in July. In the meantime, the Notice of Proposed Rulemaking including rule text showing proposed changes is enclosed for your review.

Thank you, and please reach out to me or Mike if you have any questions.

DRAFT[1] NOTICE OF PROPOSED RULEMAKING

CHAPTER 177

OREGON STATE LOTTERY

FILING CAPTION: Allowing contract termination if Lottery retailer EFT is returned NSF four times in 12 months

LAST DAY AND TIME TO OFFER COMMENT TO LOTTERY: June 30, 2023 @ 5 p.m.

HEARING(S):

DATE: Tuesday, June 13, 2023
TIME: 10-11 a.m.
OFFICER: Kris Skaro
ADDRESS and enter meeting ID: and Passcode:
SPECIAL INSTRUCTIONS:

- To join online, go to : https://teams.microsoft.com/l/meetup-join/19%3ameeting_N2YxMGY5NmItYjIxZi00NjFkLTgwMzQtZWY4ZDI3ZTA1Y2E3%40thread.v2/0?context=%7b%22Tid%22%3a%220ae1e1f5-ab37-4f6d-bcd7-c6137e9ca556%22%2c%22Oid%22%3a%223b827009-5406-4870-9a44-5875e6d0e3dc%22%7d
- To join by phone, call 971-323-0081 and enter phone conference ID: 850 819 021#

The public may submit written comment to lottery.adminrules@lottery.oregon.gov until June 30, 2023, at 5 p.m. The public may also comment at a remote rulemaking hearing held using Microsoft Teams. Use the link above to join the meeting on your computer or mobile device or join by phone by using the phone number and conference ID# above.

Only the hearings officer will attend this hearing; the purpose of the hearing is to take your comments only. Your comments (whether received in writing or at the rulemaking hearing) will be summarized for the Commission for their consideration.

If you have questions or need assistance, please contact Kris Skaro at kris.skaro@lottery.oregon.gov or 971-719-0794.

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[1] This draft notice is provided for discussion purposes at the public meeting of the Oregon State Lottery Commission. Official notice will be filed with the Oregon Secretary of State and published in the Oregon Bulletin. To be notified of Lottery rulemaking, please contact Kris Skaro at kris.skaro@lottery.oregon.gov or 971-719-0794.

NEED FOR THE RULE(S):

Each week, the Lottery does an electronic funds transfer (EFT) from each Lottery retailer in which any moneys owed to Lottery based on sales are swept less any commissions, bonuses, or other credits owed to the retailer. For most retailers, this is an uneventful weekly occurrence. But, each week, there are an average of 5 or 6 retailers whose EFT is returned for non-sufficient funds (NSF). (For context, there are about 3,900 retailers in total, meaning that the vast majority do not experience NSF in any given week.) When an NSF occurs, OAR 177-040-0052 applies, which explains the consequences for when a Lottery retailer's weekly EFT is returned as NSF.

Currently, OAR 177-040-0052 does not allow contract termination for multiple NSFs so long as the retailer pays the amount due plus a $50 fee and posts a bond that is no less than twice the retailer's weekly average EFT transfers. (A previous version of the rule required contract termination after three NSFs, but the rule was amended in 2018 to allow multiple NSFs.)

However, a small number of retailers have repeated NSFs during the year. For example, there are currently about four retailers (out of about 3,900 retailers) with more than four NSFs in the last year. Repeated NSFs create significant administrative work for the Lottery. (Under OAR 177-040-0052, the Lottery must contact the retailer, disable equipment, secure payment to cover the EFT, etc.) Repeated NSFs also raise concern that these retailers are not demonstrating financial responsibility, which is expected of Lottery retailers under state law. (See ORS 461.300(2)(a).)

Therefore, Lottery needs to amend the rule to allow contract termination when a retailer's weekly EFT is returned for non-sufficient funds (NSF) four times in a 12-month period. NSFs that are determined to be the result of bank error will continue to be excused under the rule. Additionally, the director retains the authority to make exceptions when circumstances warrant.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Lottery relied upon the following documents when drafting these temporary administrative rules. They are available upon request to Kris.skaro@lottery.oregon.gov or 503-540-1181:

(1) ORS chapter 461 available at https://www.oregonlegislature.gov/bills_laws/ors/ors461.html.
(2) OAR chapter 177 available at
https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=153.
(3) Retailer NSF statistics available upon request to kris.skaro@lottery.oregon.gov.

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

The Lottery does not believe the proposed amendments to OAR 177-040-0052 will affect racial equity in Oregon positively or negatively. The Lottery expects a very small number of retailers will be affected by the rule change and Lottery intends to apply to policy equally to all retailers, regardless of race.

That said, Lottery does not currently have racial demographic data about retailers we contract with. (Lottery contracts with business entity, rather than individuals, but Lottery is considering requesting racial demographic data on key persons associated with a business entity to improve Lottery's ability to identify disparate racial impacts.) It's reasonable to assume that some retailers may face challenges managing banking transactions than others. For example, Lottery has many retailers who do not speak English as a first language. Perhaps they will have more difficulty communicating with their financial institution or perhaps they are new to the American banking system if they are recent immigrants to Oregon.

Lottery personnel speak with retailers as soon as an NSF occurs to make sure the EFT is satisfied. At that time, Lottery provides assistance or education to the retailer if the retailer does not understand the requirements or if the retailer is unable to effectively communicate with their financial institution or the Lottery.

FISCAL AND ECONOMIC IMPACT

Taken as a whole over time, the Lottery does not believe amending OAR 177-040-0052 will have a fiscal or economic impact on state agencies, including the Lottery, or units of local government. This is because, over time, retailers come and go, and sales typically migrate to other retailers, as opposed to simply disappearing when one retailer's contract is terminated.

That said, looking at any particular contract in isolation may suggest a fiscal and economic impact on the Lottery and state agencies and units of local government that receive money from the Economic Development Fund (EDF) when a Lottery retail contract is terminated. (Lottery revenue from the sale of games is transferred quarterly to the EDF for distribution pursuant to constitutional and legislative appropriations.) To illustrate the possible impact, here are some averages:

The average Video Lottery retailer has $571,262 average yearly net sales, which is sales less prizes. This translates to annual transfer to the EDF of $372,467, which is distributed to various state agencies and units of local government pursuant to constitutional and legislative appropriations.

The average traditional Lottery retailer has annual gross sales of $196,824. This translates to an annual transfer to the EDF of $43,425. (There are currently no traditional Lottery retailers who have multiple NSFs.)

As noted above, Lottery expects most play to migrate to other retailers in the area or new retailers will contract with Lottery to meet any player demand previously met by the terminated retailer.

The Lottery estimates any business whose retailer contract is terminated under the rule will be negatively economically affected because the retailer will lose all commissions they were previously earning for Lottery sales. The amount of commissions varies from retailer to retailer so the impact to any particular retailer will vary but the average traditional lottery retailer earns $15,746 in commissions annually and the average Video Lottery retailer earns $130,363 in commissions annually.

See the Lottery's cost of compliance statement for more information.

COST OF COMPLIANCE:

(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 the Lottery and state agencies and units of local government that receive money from the EDF may be economically affected by the rules. This is because each Video Lottery retailer contract earns revenue for Lottery and the EDF through the sale of Lottery games. Thus, terminating the contract, in theory, has a negative fiscal impact when the retailer stopped earning revenue from sales. The impact will vary depending on the sales of any retailer whose contract is terminated under the rule, but, for context, the average Video Lottery retailer has $571,262 average yearly net sales, which is sales less prizes. This translates to annual transfer to the EDF of $372,467, which is distributed to various state agencies and units of local government pursuant to constitutional and legislative appropriations. The average traditional Lottery retailer has annual gross sales of $196,824. This translates to an annual transfer to the EDF of $43,425. (There are currently no traditional Lottery retailers who have multiple NSFs.)

However, as noted above, Lottery expects to see most play migrate to other locations. Additionally, a retailer with multiple NSFs may end up losing their contract eventually if they are unable to cover the EFT, fee, plus the bond. In that respect, the revenue from the retailer would be lost regardless of whether Lottery proactively terminates the contract under the proposed amendments to OAR 177-040-0052.

As to members of the public, the Lottery estimates that retailers who have four NSFs in a 12-month period that are not otherwise excused under the rule will be negatively economically affected by OAR 177-040-0052. This represents a very small number of current Lottery retailers; as of May 9, 2023, there are only four retailers who have had four or more NSFs in the last 12 months. (Contract termination under the rule is only permitted if a retailer has four NSFs after the effective date of the rule.) The Lottery estimates any business whose retailer contract is terminated under the rule will be negatively affected because they will lose all commissions they were previously earning for Lottery sales. The amount of commissions varies from retailer to retailer so the impact to any particular retailer will vary but the average traditional lottery retailer earns $15,746 in commissions annually and the average Video Lottery retailer earns $130,363 in commissions annually.

(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 the rule. This includes those that sell traditional products, Video Lottery, or both. This is 3,793 businesses as of May 10, 2023. Lottery estimates most of these, but not all, are small businesses as defined in ORS 183.310. (The Lottery does not have all the information needed to precisely estimate how many retailers are small businesses as defined in ORS 183.310, such as, but not limited to, the number of employees each Lottery retailer employs. However, it is Lottery's experience that most, but not all, Lottery retailers would meet the definition. General industry data on the types of businesses that tend to be Lottery retailers also supports the estimate that most, but not all, are small businesses. For example, the National Restaurant Association reports that 9 in 10 restaurants have fewer than 50 employees and IBIS reports that the average supermarket/grocery store has 32.2 employees. The Lottery contracts with some large chain retailers who would not meet the definition, and thus, Lottery estimates most of the approximately 3,800 Lottery retailers are small businesses, but not all.)

The type of retailer includes 526 businesses who sell Video only; 1,710 businesses who sell only traditional Lottery products like draw games, Scratch-it Tickets, and Keno; and 1,557 businesses who sell both. The type of businesses subject to OAR 177-040-0052 includes grocery stores, convenience stores, gas stations, bars, restaurants, small cafes and eateries, taverns, adult entertainment establishments, and bowling alleys. (To sell Video Lottery, the business must have an OLCC license to sell alcohol to be consumed on the premises.)

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

There are no reporting, recordkeeping, or administrative activities and costs imposed by the rule changes in and of themselves. Given the potential for contract termination, retailers may want to take more care to ensure they meet their weekly EFT payments, which may require more careful recordkeeping and administrative activities on their part.

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

There are no professional services, equipment, supplies, labor, or increased administration imposed by the rule changes in and of themselves. Given the potential consequences of multiple NSFs, retailers may want to take more care to avoid NSF, which may involve obtaining professional services (such as bookkeeping) or additional staff and labor costs.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULES

Lottery did not involve small businesses in the development of the rule. Lottery plans to notify all current Lottery retailers about the change, most of which are small businesses, to make them aware of the proposed change and opportunity to comment.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? IF NOT, WHY NOT?

No, the Lottery did not consult a Rule Advisory Committee. Very few retailers have multiple NSFs that would make them subject to additional penalties under the proposed rule. Lottery plans to notify all current Lottery retailers about the change to make them aware of the proposed change and opportunity to comment.

CONTACT:

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RULES PROPOSED:

AMEND: OAR 177-040-0052

RULE TITLE: Non-Sufficient Funds

RULE SUMMARY: Lottery is proposing to amend OAR 177-040-0052 about non-sufficient funds or NSFs. As currently written, the rule does not allow Lottery to terminate a retailer contract due to multiple NSFs so long as the retailers pays the amount due plus a $50 fee within five working days. For subsequent NSFs, the retailer must also post a bond that is no less than twice the retailer's weekly average EFT transfers.

Due to a very small number of retailers who have repeated NSFs each year, the Lottery is proposing to amend OAR 177-040-0052 to allow Lottery to terminate the retailer's contract when a retailer's weekly EFT is returned for non-sufficient funds (NSF) four times in a 12-month period. NSFs that are determined to be the result of bank error will continue to be excused under the rule. Additionally, the director retains the authority to make exceptions when circumstances warrant. (The rule is not intended to apply retroactively; contract termination will only apply when a retailer has four NSFs in a 12-month period after the effective date of the rule.)

The Lottery may make additional or alternate amendments based on information or public comment received during the public rulemaking process. For example, the Lottery may change the number of NSFs allowed each year under the rule. Additionally, the Lottery may make non-substantive changes to the rule to improve readability, organization, accuracy, or clarity of the rule in a manner that does not change the meaning of the rule, such as, but not limited to, updating the statutory authority and statutes implemented section, correcting grammatical errors, or improving the rule's organization.

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~~ Third 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~~ a third 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 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) Subsequent NSF: When a Lottery retailer's EFT payment is not made to the Lottery due to non-sufficient funds in the retailer's EFT account for a fourth 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 until the contract is terminated and the equipment is removed.

(c) Payment: Require the retailer to pay, by certified funds, the amount of money that was to be paid by EFT plus the $50 fee within five working days of the date the Lottery equipment on the retailer's premises was disabled.

(d) 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.

(e) Terminate Contract: Terminate the retailer's lottery contract and remove the Lottery's equipment. This subsection only applies to a retailer who has four NSFs within 12 months starting on or after August 1, 2023.

(~~6~~7) 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 an NSF under this rule as long as the error is corrected and Lottery receives documentation within seven 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~~8) Financial Institution Closures: Any NSF that is due to an unexpected temporary closure of the retailer's financial institution will not be treated as an NSF under this rule as long as the NSF is corrected and Lottery receives documentation within seven 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~~9) 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~~10) 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: Or Const, Art XV, § 4(4)(a), ORS 461.120, 461.130, 461.150 & 461.300
Statutes/Other Implemented: Or Const, Art XV, §4(4), ORS 461.120, 461.130, 461.150 & 461.300