



Memo

Date:	August 25, 2023
To:	Oregon State Lottery Commissioners
From:	Kris Skaro, rules and policy analyst
Subject:	Motion to Adopt re OAR 177-040-0052 (Non-Sufficient Funds)

Background:

In May, the Lottery proposed to amend the rule that applies when a retailer's weekly transfer to the Lottery is not completed due to non-sufficient funds (NSF). Currently, the rule allows unlimited NSFs so long as the retailer pays the amount owed plus an administrative fee and posts a bond. However, due to a small number of retailers who have repeated NSF issues, Lottery proposed to amend the rule to have the option to terminate the retailer's contract after four NSFs in a 12-month period. This is similar to the policy that was in effect prior to 2018, which allowed contract termination after three NSFs in a 12-month period.

Under the rule as proposed, Lottery will excuse any NSF that occurs due to bank error or bank closure. Lottery may also make exceptions in any particular case when circumstances warrant. Also, the rule will not apply retroactively; to be subject to contract termination for NSF, a retailer needs four NSFs *after* the effective date of the rule. This means any current retailer who has had repeated NSFs will have an opportunity to resolve those issues and avoid the risk of contract termination.

Rulemaking Process and Public Comment:

The Lottery filed notice of the proposed rule change on May 22, 2023 with the Oregon Secretary of State and notified interested parties, media contacts, and certain legislators. The Lottery also notified all current Lottery retailers by email. The Lottery provided more than five weeks for the public to comment in writing and held a virtual public rulemaking hearing on June 15, 2023.

The Lottery received four written comments. The comments were provided to Interim Director Wells and the Commission for their review and consideration. The comments are summarized in the enclosed Rulemaking Report.

Enclosures and Director's Recommendation:

The Rulemaking Report and Permanent Administrative Order are enclosed. Interim Director Wells has considered all comment received and reviewed the enclosed materials. He recommends the Commission adopt OAR 177-040-0052 as presented in the enclosed materials to be effective on September 1, 2023.

Thank you, and please reach out to me or Interim Director Wells if you have any questions.



Rulemaking Report

Prepared By	Kris Skaro, rules and policy analyst
Rule Caption	Allowing contract termination if Lottery retailer EFT is returned NSF four times in 12 months

Overview

This report summarizes the rulemaking process for the proposed amendment of OAR 177-040-0052, Non-Sufficient Funds. This rule applies when a Lottery retailer's weekly electronic funds transfer (EFT) to the Lottery is not completed due to non-sufficient funds (NSF) in the associated bank account. Due to a small number of retailers who have repeated NSFs, Lottery has proposed to return to a prior policy of allowing contract termination after four NSFs in any 12-month period. (The prior policy allowed contract termination after three NSFs in 12 months.)

Notice of Proposed Rulemaking

The Lottery filed a Notice of Proposed Rulemaking with the Oregon Secretary of State on May 22, 2023 indicating that the Lottery proposed to amend OAR 177-040-0052 to allow contract termination when a retailer's weekly EFT is returned for non-sufficient funds (NSF) four times in a 12-month period:

Amend: OAR 177-040-0052 Non-Sufficient Funds

Rulemaking Timeline

Date	Rulemaking Activity
5/19/23	Proposed rules listed on Commission agenda. Draft rules and notice included in public meeting materials. Lottery presented proposed rules to Commission.
5/22/23	Lottery filed a Notice of Proposed Rulemaking with the Oregon Secretary of State.
5/22/23	Lottery notified Interested Parties, legislators, and media contacts.
5/30/23	Lottery notified all current Lottery retailers.
6/1/23	Notice was published in the Oregon Bulletin.
6/15/23	Lottery held a public rulemaking hearing.
6/30/23	Written comment period closed at 5 p.m.
8/31/23	Lottery will present the final recommended rules to the Commission and ask the Commission to adopt as presented. Final recommended rules and proposed Permanent Administrative Order included in public meeting materials.
TBD	Lottery filed a Permanent Administrative Order with the Oregon Secretary of State.
9/1/23	Proposed rules effective.

Public Comment Opportunities and Summary of Comment Received

The Lottery provided more than five weeks for the public to comment in writing and held a virtual public rulemaking hearing. The Lottery received four written comments by email. No one appeared at the virtual rulemaking hearing on June 15, 2023. All written comments are saved for the record and available for review upon request.

The Public Comment Report (including summarizes and full text of the four written comments) was provided to the Commission and Interim Director Wells for their review and consideration. Here's a summary for this report:

Comment #1: He opposes the change. He supports the current rule, which allows unlimited NSF's so long as the retailer pays the amount owed, pays an administrative fee, and posts a bond.

Comment #2: She was surprised to learn that Lottery allows any NSF's. She thinks if Lottery wants to get more VLTs, they should get them from retailers who have NSF's rather than retailers who can't meet the weekly sales requirement.

Comment #3: She thinks Lottery already has authority to terminate contracts for reasons for character and honesty and NSF's raise questions about the retailer's character and honesty.

Comment #4: She wants Lottery to consider NSF's on a case-by-case basis. She personally experienced an NSF as a Lottery retailer but it was because her partner was sick and there was miscommunication regarding their new bank account. (Note that the rule as proposed would continue to allow Lottery to make exceptions based on the circumstances of any NSF.)

Director's Recommendation and Commission Motion to Adopt

Interim Director Wells considered all comments received and reviewed the rule. He recommends the Commission adopt OAR 177-040-0052 as presented in the enclosed draft Permanent Administrative Order to be effective on September 1, 2023.

Enclosures

Draft permanent administrative order and rule text showing final recommended language.

PERMANENT ADMINISTRATIVE ORDER

CHAPTER 177
OREGON STATE LOTTERY

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

EFFECTIVE DATE: 09/01/2023

AGENCY APPROVED DATE: Pending Commission Motion 8/31/23

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AMEND: 177-040-0052

RULE TITLE: Non-Sufficient Funds

RULE SUMMARY: Lottery is amending 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 amending OAR 177-040-0052 to allow Lottery to terminate the retailer's contract when a retailer's weekly EFT is returned for nonsufficient 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.

For the record, 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. (In the notice, this was explicitly stated in the rule text, but in the final text, that language is removed because it's typically understood that a rule is not retroactive unless clearly stated otherwise.)

RULE TEXT:

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) Fourth NSF: When a Lottery retailer's EFT payment is not completed to the Lottery due to NSF in the retailer's EFT account 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.

(67) 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.

(78) 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.

(89) 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.

(910) 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](#)