



# Memo

<b>Date:</b>	April 14, 2023
<b>To:</b>	Oregon State Lottery Commissioners
<b>From:</b>	Kris Skaro, rules and policy analyst
<b>Subject:</b>	VLT Inventory Management Rules Changes (OAR 177-040-0001; 177-040-0003; 177-040-0017; 177-045-0030; 177-045-0035)

## Background:

Since December 2021, the Lottery has been working to address shortfalls in VLT inventory and to develop and implement a long-term VLT inventory management strategy that will ensure the long-term success and sustainability of the Lottery's Video Lottery Program. Video Lottery is the most important source of Lottery revenue, currently forecasted to generate \$1.6 billion in the 2023-25 biennium, providing funding for public education, state parks and natural resources, economic development and job creation, and veterans' services.

During the pause, the Lottery made progress toward addressing inventory issues:

- Resumed normal equipment management activities that had been suspended during COVID, including removing under-performing VLTs and replacing old terminals with new models.
- Secured Commission approval to spend \$35M to purchase VLTs in FY 22.
- Processed some applications despite the pause, including those in progress when the pause went into effect, as well as additional applications selected through drawings in 2022 and 2023.
- Identified 50 VLTs to reallocate to high-performing retailers who do not yet have six VLTs.

## Proposed Rulemaking:

The Lottery now proposes rule changes to support the next phase in VLT inventory management in which the pause on applications will be lifted and other policy changes will be adopted to support the long-term success and sustainability of the Video Lottery Program. The full rule text showing proposed changes is enclosed, but briefly, the rules do the following:

- **Repeal the Temporary Pause:** Repeal the temporary pause on processing new Video Lottery retailer contract applications that went into effect January 2022.
- **Establish a Waitlist for Applicants:** The Lottery will establish a waitlist to allow interested and eligible applicants to join the waitlist by submitting a webform online. Lottery will determine the number of applications that will be processed each quarter and process applicants from the waitlist in the order received, with authority to prioritize certain applicants likely to improve sales or improve the geographic availability of games.
- **Increase the Weekly Sales Requirement:** Currently, each VLT needs to have sales of an average of \$2,667 dollars played per week. Lottery thinks the sales amount that would best justify the allocation of a VLT to a particular retailer is \$10,000 dollars played per week. While most Video

Lottery retailers currently meet this requirement, there are about 250 retailers that do not. Under the proposed rule change, Lottery could reallocate those low-performing VLTs to high-performing retailers, boosting overall Video Lottery sales and retailer commissions. (Lottery does not remove a VLT for not meeting the sales goal if the retailer only has one. In Lottery's experience, the impact to a retailer who loses a VLT is mitigated as most play migrates to remaining VLTs.)

- **Increased Video Lottery Contract Application Requirements:** Lottery proposes to return to the requirement that a business to be open and operating for at least nine months prior to initiating an application. (There is a waiver process for current retailers with two or more locations that meet criteria.) This will ensure Lottery only contracts with viable businesses who are likely to be successful over the long-term.
- **Limit Use of Temporary Contract.** The Lottery proposes to limit the use of the temporary contract process to traditional contracts and, for Video, sales of business, change of ownership, and 100% stock buyouts. This means no temporary contracts for new VLT installations, which prevents the risk of installing VLTs at a location that is not ultimately approved for a regular contract.

#### **Next Steps/Enclosures:**

The Notice of Proposed Rulemaking is enclosed and includes rule text showing proposed changes.

The Lottery will be engaging interested parties, including all current Video Lottery retailers. I will report back to the Commission in June on public comment received and recommended rules for adoption by the Commission.

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

## DRAFT<sup>1</sup> NOTICE OF PROPOSED RULEMAKING

### CHAPTER 177 OREGON STATE LOTTERY

**FILING CAPTION:** *Repealing pause on Video applications; increasing VLT sales requirement; establishing waitlist and new application requirements*

**LAST DAY AND TIME TO OFFER COMMENT TO AGENCY:** 05/31/2023 @ 5:00 PM

#### **HEARING(S):**

DATE: 05/16/2023

TIME: 10:00 AM - 12:00 PM

OFFICER: Kris Skaro

#### **REMOTE MEETING DETAILS**

MEETING URL:

[Click here to join the meeting](#)

PHONE NUMBER: 971-323-0081

CONFERENCE ID: 879663414

#### **SPECIAL INSTRUCTIONS:**

The public may submit written comment to [lottery.adminrules@lottery.oregon.gov](mailto:lottery.adminrules@lottery.oregon.gov) until May 31, 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](mailto:kris.skaro@lottery.oregon.gov) or 971-719-0794.

#### **NEED FOR THE RULE(S):**

The Lottery needs to repeal and amend rules as described in this Notice to reflect the next phase in Lottery's Video Lottery Terminal (VLT) equipment management approach.

In December 2021, the Lottery has stopped processing applications for new Video Lottery retailer contracts due to VLT inventory constraints. Since that time, Lottery has worked to resolve inventory issues, including securing funding for additional VLT purchases, replacing obsolete VLTs in the field, resuming normal

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<sup>1</sup> This is a draft Notice of Proposed Rulemaking. Official notice will be filed with the Oregon Secretary of State and published in the Oregon Bulletin. Lottery will send the formal notice to interested parties and others as required by law and will publish the notice on the Lottery's website. Any person may request to be notified directly by email or postal mail of Lottery rulemaking. Please contact Kris Skaro at [kris.skaro@lottery.oregon.gov](mailto:kris.skaro@lottery.oregon.gov) or 971-719-0794 for more information.

equipment management activities, processing a limited number of applications as equipment allowed, and adding VLTs to high-performing retailers.

Lottery now proposes to repeal the pause and reopen the application process using a quarterly waitlist. Additionally, the Lottery is adopting policy changes that will allow the Lottery to responsibly and efficiently allocate Video Lottery Terminals (VLTs) among current and prospective Video Lottery retailers in a manner than maximizes Video Lottery revenue commensurate with the public good.

The purpose of the rule changes is to ensure the sustainability of the Lottery's Video Lottery Program, which is a critical source of revenue for the public purposes described in Article XV, section 4, of the Oregon Constitution.

Specifically:

The Lottery needs to amend OAR 177-040-0001 about general retailer contract application requirements to notify readers that additional applications requirements apply to some Video Lottery contract applicants in OAR 177-040-0017. This change ensures those applicants are aware that additional requirements may apply to them.

The Lottery needs to amend OAR 177-040-0003 about application for temporary retailer contracts to limit the use of temporary contracts to only certain types of contract applications. Temporary contracts for new VLT retailer installations create risk that VLTs will be installed at a retailer location that is not ultimately approved for a regular contract, leading to additional work (to install and then remove VLTs) and inefficient allocation of terminals. The proposed amendments to OAR 177-040-0003 allow only certain types of Video Lottery retailer contract applications to be eligible for a temporary contract. Those include sale of business, change of ownership, and 100 percent stock buyouts in which the network line is not removed from the retailer. (Contract applications to sell traditional Lottery products like draw games, Scratch-it Tickets, and Keno remain eligible for temporary contracts.)

The Lottery needs to amend OAR 177-040-0017 to communicate the new process for processing Video Lottery retailer contract applications that will apply when the pause in OAR 177-045-0035 is repealed. The Lottery also needs to amend OAR 177-040-0017 to require that an applicant's business has been open and operating continuously for at least nine months prior to starting an application for a Video Lottery retailer contract. The Lottery believes reinstating this requirement will increase the likelihood that Lottery contracts with businesses that are viable over the long-term and businesses that are able to comply with the requirements in OAR 177-040-0061 relating to the constitutional prohibition on casinos. (The proposed rule allows the requirement to be waived for current retailers who meet certain requirements.)

The proposed amendments to OAR 177-040-0017: establish a waitlist; explain eligibility criteria and method for an applicant to be added to the waitlist; establish increased application threshold requirements, including that the business has been open and operating for at least nine months prior to initiating an application unless a waiver is approved; exempt certain applicants from the new requirements; and establish how Lottery will select applicants from the waitlist to move forward each quarter if the director determines applications will be processed.

The proposed changes communicate all requirements to interested applicants that will apply when the pause is repealed; impose higher threshold standards on applicants to improve the quality and long-term success of Video Lottery retailers; and direct Lottery to determine the number of applications that will be processed each quarter and process them as described in the proposed rule.

The Lottery needs to amend OAR 177-045-0030 about VLTs to increase the weekly sales requirement from \$2,667 to \$10,000. For many years, the Lottery has had a weekly sales requirement for Video Lottery retailers. The currently weekly sales requirement is \$2,667 dollars played per week per terminal. OAR 177-045-0030 authorizes Lottery to remove one or more VLTs when the retailer is unable to meet the requirement. (Some Video Lottery retailers only have one VLT. If a retailer has only one VLT, the Lottery will not remove the VLT for

failure to meet the weekly sales requirement.) The average dollars played per VLT per week is calculated as the dollars played at a site over a 52-week evaluation period divided by the weeks of Video Lottery activity, divided by the number of VLTs at the establishment. For context, the average Video Lottery retailer had \$26,576 in dollars played per VLT per week during calendar year 2022.

As Lottery has faced VLT inventory constraints in recent years, the Lottery has reviewed the entire VLT ecosystem, including reviewing whether the current weekly sales requirement of an average of \$2,667 dollars played per week per VLT is the right amount to ensure Lottery is able to efficiently allocate VLTs among retailers. While the Lottery has updated the weekly sales goal in recent years to convert the format (from “net sales” to “dollars played”), the amount of the sales goal has not been updated at least since 2012.

Through this review, the Lottery determined the appropriate sales requirement is an average of \$10,000 dollars played per week per VLT. This was a threshold selected after consideration of the many expenditures that go into operating a VLT: prizes, cost of the VLT itself, parts and paper, Economic Development Fund (EDF) transfer, personnel expenses of support staff, game vendor charges, retailer commissions, and content costs. Based on recent play session reviews, a VLT averaging \$10,000 in dollars played per VLT per week sees approximately 568 minutes of play per week, or 81 minutes per day. At an establishment open for 12 hours per day, this means the VLT is untouched for 89% of the time.

Additionally, Lottery experience suggests that most relocated VLTs see increased sales. Thus, Lottery believes taking this action to amend OAR 177-045-0030 will lead to overall increased Video Lottery sales to benefit the Lottery and the public purposes described in Article XV, section 4, of the Oregon Constitution, as well as increased commissions to a retailer who gains a VLT. While there may be a negative impact to some retailers that lose one or more VLTs, historical data suggests that most of that retailer’s play (77%) will migrate to the VLTs that remain at the retailer. (Again, the Lottery will not remove a VLT for failure to meet the weekly sales requirement if the retailer only has one VLT.)

The Lottery is proposing to repeal OAR 177-045-0035, which imposed a temporary pause on processing applications for additional Video Lottery retailer locations with some exceptions. This rule was intended to be a temporary pause (hence the title) to allow Lottery to address short-term VLT inventory issues and develop a long-term comprehensive plan moving forward to improve VLT inventory management.

While the pause was in place, the Lottery undertook various activities to address inventory issues. With these activities completed, the other rules described in this notice establish a new process for processing applications and managing inventory going forward, including establishing a waitlist for interested applicants; raising the standards for applicants to apply; and increasing the sales performance expectation of VLTs currently in the field. These changes plus the plan to set aside funds each year to be available to invest in upgraded VLTs should set Lottery on a strong course moving forward and eliminate the need for the total pause on applications. Note that under OAR 177-040-0017 as amended, if the Lottery does experience inventory shortfalls in the future for whatever reason, the Director may determine that zero applications will be processed in any given quarter.

Therefore, the full pause on processing applications is no longer needed and would cause conflict if the rule remained in place. Therefore, Lottery needs to repeal OAR 177-045-0035. (During the pause, there was an exception for tribally owned applicants in OAR 177-045-0035. Tribally owned businesses will continue to be exempt from the waitlist under OAR 177-040-0017 as amended. See proposed rule language.)

#### **DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:**

- Lottery data showing sales improvement from relocating VLTs, available upon request to [lottery.adminrules@lottery.oregon.gov](mailto:lottery.adminrules@lottery.oregon.gov).
- Current retailer average dollars played performance over the past year, available upon request to [lottery.adminrules@lottery.oregon.gov](mailto:lottery.adminrules@lottery.oregon.gov).
- Discussion and related documents pertaining to Commission approval to purchase additional

VLTs at the public meeting of the Oregon Lottery Commission on June 24, 2022, available at <https://www.oregonlottery.org/about/how-we-operate/commission-meeting-june-24-2022/>.

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

The Lottery does not believe amending and repealing the rules described in this Notice will affect racial equity in Oregon.

Discussion:

The Lottery does not collect racial demographic data on retailers at this time. With the adoption of the racial equity impact statement requirement for rulemaking, the Lottery is currently working to develop a plan to collect racial demographic data on retailers to improve Lottery's ability to identify disparate racial impacts. (The Lottery consulted publicly available data such as census data and Portland State University Population Research Center. For Lottery, the issue with using these data sources to draw conclusions about the race or socioeconomic status of Lottery retailers or players is that a person's personal residence is not necessarily the same as where their business is located (for Lottery retailers) or the same location where they play Lottery games. For example, a person may live in Oregon City but have a business that sells Video Lottery in Milwaukie. Or, a person may reside in Lake Oswego, but may play Video Lottery at a restaurant near their office in Tigard. Additional complications include the fact that most Lottery play is completely anonymous and, for Lottery retailers, the Lottery contracts with a business entity, rather than individual people. The business entity may have an address that is disconnected to the personal residences of all the people associated with the business.)

Despite not having racial demographics of Lottery retailers, Lottery's experience is that some retailers are members of minority racial communities as well as retailers who have recently immigrated to the United States and who may not speak English as their first language.

Therefore, Lottery understands any policy changes that affect our retailers may impact different racial groups.

These changes taken together allow Lottery to resume processing Video Lottery retailer contract applications. The rules also impose higher standards for new applicants (including that their business has been open and operating for at least nine months prior to initiating an application) and limit the use of temporary contracts for Video Lottery. The proposed rules also increase the weekly sales requirement for VLTs, which may result in some retailers losing VLTs while others may gain.

The Lottery expects that taken together the changes will modestly increase Video Lottery sales over time, which will result in additional revenue available for the public purposes that receive Lottery revenue as well as increased commissions for successful Video Lottery retailers. But some applicants or current retailers may be negatively affected by the changes if, for example, they must delay their application because their business hasn't been open and operating for nine months or the retailer loses a VLT for failure to meet the sales requirement.

The Lottery has no reason to expect any racial group will be impacted more or less than other racial groups. As noted elsewhere, the Lottery expects the fiscal impact to retailers that lose a VLT to be minimal.

To promote positive relations with federally recognized tribes in Oregon, tribally owned businesses that are located off tribal lands that want to apply for a Video Lottery retailer contract are exempt from the new application requirements for Video Lottery.

#### **FISCAL AND ECONOMIC IMPACT:**

The Lottery estimates that amending OAR 177-040-0001, 177-040-0003, 177-040-0017, and 177-045-0030 and repealing OAR 177-045-0035 will (taken together) have a positive fiscal impact on the Lottery and state agencies and units of local government that receive Lottery revenue from the Economic Development Fund (EDF). The actual fiscal impact will vary depending on many factors including how many applications are processed and approved; how many VLTs are relocated; and the sales performance of the approved retailers and relocated VLTs, which are in turn impacted by many factors, including macroeconomic conditions. With those caveats in mind, the Lottery estimates together these rule changes may increase net Video Lottery sales by \$17 million by the end of 2024, which would represent approximately \$11 million in additional funds transferred to the Economic Development Fund (EDF) and available for distribution to the public purposes described in Article XV, section 4, of the Oregon Constitution.

The Lottery estimates that amending OAR 177-040-0001, 177-040-0003, 177-040-0017, and 177-045-0030 and repealing OAR 177-045-0035 will (taken together) have a positive fiscal impact on some current and prospective Video Lottery retailers. The changes will allow Lottery to process and approve new contract applications for Video Lottery and may result in more VLTs being available to add to high-performing retailers over time. Although the estimated impact will vary by retailer, to get a sense of the possible fiscal impact to a retailer applicant who is approved for a contract under the rule changes, the average weekly commissions for a new retailer in business year 2021 after three months was \$2,085. The Lottery estimates that a retailer who gains a VLT under the rule changes may see their commissions increase 10%.

The Lottery estimates that amending OAR 177-040-0001, 177-040-0003, 177-040-0017, and 177-045-0030 and repealing OAR 177-045-0035 will (taken together) have a negative fiscal impact on some Video Lottery retailers. Some of the changes (like the waitlist, requirement to be open and operating for nine months before starting an application, and the limit on temporary contracts) will delay an applicant's ability to start earning Video Lottery commissions. As noted above, the average weekly commissions for a new retailer in business year 2021 after three months was \$2,085. Other changes (see OAR 177-045-0030) may result in a retailer losing an under-performing VLT. Historical VLT removals from 2015-2019 resulted in a 4.6% decrease in dollars played across 162 retail sites. 40% of sites saw an increase in play after the removal while 60% saw a decrease. Lottery's data showed that 77% of play migrated to VLTs that remained at the retailer's premises after removal, significantly reducing the fiscal impact to the retailer. Lottery expects this to be the case for some retailers who lose VLTs as a result of this rule change. Certainly, some retailers that lose a VLT will see a modest reduction in their commissions. The average weekly commissions for a low-performing retailer, with 52 weeks of sales, in BY2022 was \$590 and some retailers who lose a VLT could be expected to see a decrease in commissions if less than 100% of play migrates to remaining VLTs.

See the Lottery's cost of compliance and small business impact statements below for more information.

#### **COST OF COMPLIANCE:**

**PART 1: Identify any state agencies, units of local government, and members of the public likely to be**

### **economically affected by the rules:**

OAR 177-040-0001: The Lottery estimates amending OAR 177-040-0001 will have no fiscal or economic impact on state agencies, including the Lottery, units of local government, or members of the public.

OAR 177-040-0003: The Lottery estimates amending OAR 177-040-0003 will have no fiscal or economic impact on the Lottery, other state agencies, or units of local government. The Lottery estimates amending OAR 177-040-0003 will have a negative fiscal impact on a Video Lottery retailer contract applicant who must complete the regular contract application process before VLTs are installed at their business premises. The regular process typically takes longer than the temporary process, which delays the time in which the retailer can have VLTs installed and start earning commissions on sales. As noted above, the average weekly commissions for a new retailer in business year 2021 after three months was \$2,085. The time to complete an application varies based on a variety of factors but generally, the application process for a regular contract takes about 45-60 business days whereas the temporary contract application process can be completed in 5-10 business days.

OAR 177-040-0017 and OAR 177-045-0035: The Lottery estimates repealing OAR 177-045-0035 and amending OAR 177-040-0017 will have a positive fiscal impact on the Lottery and other state agencies and units of local government that typically receive Video Lottery revenue from the Economic Development Fund (EDF).

Taken together, the amendments to OAR 177-040-0017 and the repeal of OAR 177-045-0035 allow Lottery to return to processing Video Lottery retailer contract applications while also enacting policy changes that are intended to increase the likelihood that Video Lottery retailer applicants have long-term success in selling Video Lottery games. Of course, the purpose of selling Video Lottery games and transferring net revenue to the EDF is to providing funding for the public purposes described in Article XV, section 4, of the Oregon Constitution.

It's difficult to predict the future revenue that will accrue to Lottery and the EDF with confidence because the revenue depends on the number of applications Lottery processes each quarter and the success of any retailers approved. (Lottery sales are also impacted by macroeconomic factors.) Nevertheless, to give the public a sense of the fiscal impact of approving new retailer contracts on Lottery sales, consider that there were 56 new Video Lottery retailers that completed their applications in 2021 and remained open through at least all of 2022. Those 56 retailers generated \$14,678,018 in net sales, corresponding to transfers to the EDF of \$9,570,068, in calendar year 2022. If Lottery is able to process and approve applications from a similar number of retailers, by the end of 2024, Lottery estimates a similar fiscal impact to Lottery and the transfer to the EDF.

With respect to the possible increase in revenue to the EDF, that revenue will likely flow to various state agencies and units of local government. It's hard for Lottery to confidently predict the exact amount that would accrue to any particular recipient, since the Legislature has discretion in distributing Lottery revenue. The public can see typical disbursements of Lottery revenue to various state agencies and units of local government at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63228> in the Budget Report from HB 5033 (2021). Note also that just because Lottery earns a certain amount of additional revenue from Video Lottery, at the same time, Lottery may lose retailers through attrition or other reasons unrelated to the rules, so there's a natural churn in Video Lottery revenue that will offset some of the new revenue that might materialize in the period after these rules take effect.



The Lottery estimates repealing OAR 177-045-0035 and amending OAR 177-040-0017 will have positive and negative fiscal and economic effects on businesses looking to apply for a new Video Lottery retailer contract. The fact that the rules, taken together, lift the pause and allow Lottery to resume processing applications will certainly have a positive fiscal impact on any applicant approved under the rules to offer Video Lottery games in their establishments. The average weekly commissions for a new retailer in business year 2021 after three months was \$2,085.

On the other hand, the amendments to OAR 177-040-0017 impose new threshold requirements on Video Lottery retailer contract applicants, including the requirement to be open and operating for at least nine months unless a waiver is approved. For an applicant who needs to wait for nine months to apply for a contract, that is a delay in their ability to earn commissions. As noted above, the average weekly commissions for a new retailer in business year 2021 after three months was \$2,085.

Applicants who have been open and operating for nine months, but who are not able to apply because they are not selected from the waitlist in a given quarter will similarly lose possible commissions they would have otherwise earned during their time on the waitlist.

The Lottery estimates amending OAR 177-045-0030 to increase the weekly sales requirement for VLTs will have a positive fiscal impact on the Lottery over time, as well as to state agencies and units of local government that typically receive revenue from the Economic Development Fund (EDF). Recently, in March 2023, Lottery installed 50 VLTs in high-performing locations and saw an average sales increase of 10.1% per retailer.

As for the estimate of the revenue that might be generated over time from the rule change, as of today, there are 250 VLTs that do not meet the \$10,000 sales requirement. If those were moved to higher performing retailers by 12/31/23, into the top 250 retailers with 5 VLTs (\$1,440,948,441 dollars played in weeks ending in 2022), saw 5% growth per retailer (\$28,818,969 additional dollars played) from the new terminal, that would result in \$1,503,197 in additional transfers to the EDF (92% prize payout assumed).

This assumes that all 250 VLTs would be moved, which will not be the case. Nevertheless, this figure is intended to give the public a sense of the possible fiscal impact of this policy change.

As to the estimated impacted to state agencies and units of local government, while we can estimate the amount transferred to the EDF from additional sales, the Legislature has discretion (within constitutional constraints) to distribute revenue from the EDF to various state agencies and units of local government. Therefore, Lottery is not able to confidently estimate the impact to any particular state agency or unit of local government. As noted above, the public can see typical disbursements of Lottery revenue from the EDF to various state agencies and units of local government at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63228> in the Budget Report from HB 5033 (2021).

Lottery estimates amending OAR 177-045-0030 to increase the weekly sales requirement for Video Lottery retailers will have a positive fiscal impact on some current Video Lottery retailers and a possible negative fiscal impact on around 250 current Video Lottery retailers:

Current Retailer That Loses One or More VLTs: Most Video Lottery retailers (about 88%) meet the proposed

weekly sales requirement of \$10,000 dollars played per week per VLT. But, as of this writing, there are about 250 Video Lottery retailers who have a VLT that has average sales below \$10,000 dollars played per week. (That number excludes retailers that only have one VLT. Those retailers are not normally subject to removal for failure to meet the weekly sales requirement.) This is about 12% of all Video Lottery retailers. Under the proposed rule change, the Lottery could reallocate that VLT to a higher-performing retailer who does not yet have six VLTs or Lottery could use the VLT to install at a new location.

Historical VLT removals from 2015-2019 resulted in a 4.6% decrease in dollars played across 162 retail sites. 40% of sites saw an increase in play after the removal while 60% saw a decrease. Lottery's data showed that 77% of play migrated to VLTs that remained at the retailer's premises after removal, significantly reducing the fiscal impact to the retailer. Lottery expects this to be the case for some retailers who lose VLTs as a result of this rule change. Certainly, some retailers that lose a VLT will see a modest reduction in their commissions. The average weekly commissions for a low-performing retailer, with 52 weeks of sales, in BY2022 was \$590 and some retailers who lose a VLT could be expected to see a decrease in commissions if less than 100% of play migrates to remaining VLTs.

**Current Retailer That Gains One or More VLTs:** Lottery estimates that any high-performing retailer who has an additional VLT installed under this rule change can expect their monthly commissions to increase 10%.

## **PART 2: Effect on Small Businesses:**

A note that applies to the follow statements regarding the proposed rules effect on small business: 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.

### **OAR 177-040-0001:**

#### **(a) Estimate the number and type of small businesses subject to the rule(s);**

Any business that wants to apply for a contract to sell Lottery products (traditional or Video) is subject to OAR 177-040-0001. (It is voluntary for a business to apply, so no businesses are required to comply per se.) This would include all current retailers and any business who applies in the future. There are currently about 3,800 retailers and in a typical year, Lottery receives about 322 retailer contract applications from businesses. (This figure is from calendar year 2019 which includes 135 applications for Video, 113 applications for traditional, and 74 applications for both Video and traditional. Some of the applications are from new applicants whereas others are from current retailers looking to add a location and yet others are for the same retailer premises, but the business ownership has changed.) As noted above, most (but not all) of these businesses are small businesses as defined in ORS 183.310. The type of business subject to this rule includes grocery stores, gas stations, convenience stores, multi-state large chain retail stores, bars, restaurants, taverns, delis, small eateries, adult entertainment establishments, bowling alleys, and the like.

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

OAR 177-040-0001 imposes many reporting, recordkeeping, and administrative activities on applicants, such as to complete an application and supply any requested information to the Lottery. That said, the proposed changes do not impose any new activities or costs of compliance, and it is always completely optional for any business to apply for a Lottery contract.

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

OAR 177-040-0001 may impose administrative costs on an applicant, in terms of completing an application and reporting or disclosing certain information in the application process, but the proposed rule changes do not impose any new costs; applying for a Lottery contract is completely voluntary for any business.

**OAR 177-040-0003:**

**(a) Estimate the number and type of small businesses subject to the rule(s);**

The only business subject to OAR 177-040-0003 is one that has chosen to apply for a Lottery retailer contract. This would include all current retailers (although, as approved retailers, they are no longer subject to the rule unless they apply to add a location) and any business who applies in the future. There are currently about 3,800 retailers and in a typical year, Lottery receives about 322 retailer contract applications from businesses. (This figure is from calendar year 2019 which includes 135 applications for Video, 113 applications for traditional, and 74 applications for both Video and traditional. Some of the applications are from new applicants whereas others are from current retailers looking to add a location and yet others are for the same retailer premises, but the business ownership has changed.) As noted above, most (but not all) of these businesses are small businesses as defined in ORS 183.310. The type of business subject to this rule includes grocery stores, gas stations, convenience stores, multi-state large chain retail stores, bars, restaurants, taverns, delis, small eateries, adult entertainment establishments, bowling alleys, and the like.

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

OAR 177-040-0003 imposes many reporting, recordkeeping, and administrative activities on applicants, such as to complete an application and supply any requested information to the Lottery. As part of the temporary contract approval process, the Lottery may impose additional activities and costs on an applicant, such as training and fees associated with selling Lottery products. However, the proposed changes do not impose any new activities or costs of compliance per se. Rather, the proposed changes restrict the use of temporary contracts, which imposes delays for an applicant who must use the regular contract process, which takes longer than the temporary process, and thus delays their opportunity to start earning commission on sales, as discussed elsewhere in this Notice. But the delay in and of itself does not impose new costs of reporting, recordkeeping, or administrative activities.

**(c) Estimate the cost of professional services, equipment supplies, labor and increased administration**

**required to comply with the rule(s).**

OAR 177-040-0003 may impose costs related to completing an application, reporting or disclosing certain information in the application process, and complying with requirements relating to the contract approval. That said, the proposed rule changes do not impose any new costs per se, but rather limit the use of temporary contracts, which itself may impose indirect costs by delaying the applicant's ability to earn commissions on sales, which are disclosed elsewhere in the Notice. But the delay in and of itself does not impose new costs of professional services, equipment, supplies, labor, or increased administration.

**OAR 177-040-0017:**

**(a) Estimate the number and type of small businesses subject to the rule(s);**

Some Video Lottery retailer contract applicants will be subject to the additional requirements in OAR 177-040-0017. This includes all current Video Lottery retailers (although being approved retailers, they are no longer directly subject to the rule unless they apply to add a location) and any business that applies for Video Lottery in the future. There are currently about 3,800 retailers and in a typical year, Lottery receives about 322 retailer contract applications from businesses. (This figure is from calendar year 2019 which includes 135 applications for Video. A portion of the applications are for new Video Lottery retailer installations that would be subject to some of the new requirements in the rule, such as to be open and operating for at least nine months prior to applying.) As noted above, most but not all of these are likely to meet the definition of a small business in ORS 183.310. The type of business eligible to sell Video Lottery games is an OLCC-licensed establishment such as a bar, restaurant, tavern, adult entertainment establishment, bowling alley, and small deli, café, or eatery.

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

The amendments to OAR 177-040-0017 impose new administrative activities on some Video Lottery retailer contract applicants, such as to submit a webform online to be added to the waitlist. Additionally, a business needs to be open and operating for at least nine months prior to starting an application; there are costs associated with the delay in being able to apply (discussed elsewhere in this notice) but there may also be recordkeeping and reporting activities for an applicant if Lottery needs the applicant to demonstrate that they were open and operating continuously. (The standards for this are described in the rule.)

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

The amendments to OAR 177-040-0017 impose new administrative activities on some Video Lottery retailer contract applicants, such as to submit a webform online to be added to the waitlist. Additionally, a business needs to be open and operating for at least nine months prior to starting an application; there are costs associated with the delay in being able to apply (discussed elsewhere in this notice) but there may also be recordkeeping and reporting activities for an applicant if Lottery needs the applicant to demonstrate that they were open and operating continuously. (The standards for this are described in the rule.)

**OAR 177-045-0030:**

**(a) Estimate the number and type of small businesses subject to the rule(s);**

All current Video Lottery retailers are subject to OAR 177-045-0030. There are currently 1,556 Video Lottery retailers. As noted above, most but not all of these are likely to meet the definition of a small business in ORS 183.310. The type of business eligible to sell Video Lottery games is an OLCC-licensed establishment such as a bar, restaurant, tavern, adult entertainment establishment, bowling alley, and small deli, café, or eatery.

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

The proposed amendments to OAR 177-045-0030 do not impose any reporting, recordkeeping, or administrative activities or costs of compliance on small businesses. The Lottery knows the sales performance of all VLTs at any given time without any work or reporting on the part of the retailer. The retailer may, nevertheless, be affected by the rule, as disclosed elsewhere in this notice.

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

The proposed amendments to OAR 177-045-0030 do not impose any new professional services, equipment, supplies, labor, or increased administration to comply. If a retailer wants to increase their Video Lottery sales to meet the sales requirement, the retailer may invest in improving the sales environment of the establishment, and there may be costs associated with those activities. However, maintaining a successful selling environment is already required by the Retailer Contract and other Lottery rules. No additional activities are required by the proposed amendments to OAR 177-045-0030. A retailer may otherwise be affected by the rule (such as by losing or gaining a VLT) as disclosed elsewhere in the notice.

**OAR 177-045-0035:**

**(a) Estimate the number and type of small businesses subject to the rule(s);**

The Lottery is proposing to repeal this rule, so there will be no small businesses subject to the rule.

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

The rule is proposed to be repealed, so OAR 177-045-0035 will not impose new reporting, recordkeeping, or administrative activities or costs of compliance on small businesses.

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

The rule is proposed to be repealed, so OAR 177-045-0035 will not impose new costs on small businesses.

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

Lottery plans to contact each current Video Lottery retailer (most of which are probably small businesses as

defined in ORS 183.310) regarding the proposed changes and will accept and consider their comments during the rulemaking process. Lottery also plans to contact retailer and small business representatives and advocates such as the Oregon Restaurant and Lodging Association. Other small businesses are invited to comment during the rulemaking process.

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

No. The Lottery used an internal process to develop these recommendations to move Lottery out of the pause. However, the work has been greatly informed by public comment received by the Lottery from retailers and other stakeholders about the impact of the pause and urging Lottery to reopen applications. These proposed rules are in part responsive to input received. The Lottery has a communications plan to notify and engage with stakeholders prior to and during the rulemaking process.

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#### **RULES PROPOSED:**

177-040-0001, 177-040-0003, 177-040-0017, 177-045-0030, 177-045-0035

AMEND: 177-040-0001

RULE TITLE: General Application Requirements

RULE SUMMARY: The Lottery is proposing to amend OAR 177-040-0001 to add a note to direct readers to additional requirements for Video Lottery Retailer Contract Applications that are described in OAR 177-040-0017.

The Lottery may make additional or alternative amendments in response to information learned or public comment received during the rulemaking process.

The Lottery may make non-substantive amendments to improve the accuracy, clarity, organization, or readability of the rule, or to update the statutory authority and statutes implemented section of the rule.

RULE TEXT:

#### **177-040-0001**

##### **General Application Requirements**

- (1) General: Any person may request an application from the Lottery. [See OAR 177-040-0017 for additional requirements that apply to some Video Lottery Retailer Contract applications.](#)
- (2) Disclosure Required: The Director may require any degree or type of disclosure necessary of the applicant or any other person in order to ensure the fairness, integrity, security, and honesty of the Lottery. An applicant must disclose to the Lottery all information required by the Director.

- (3) Application Required: An applicant must file a complete application with the Oregon Lottery. The applicant must provide a complete personal disclosure, including documents and other information requested by the Lottery relating to the applicant's personal, financial, and criminal background and an applicant's associations with other persons. The application shall also include, but not be limited to:
- (a) Authorization: An authorization, signed by the applicant, to investigate the applicant.
  - (b) Consent: Written consent to allow the examination of all accounts and records to be considered by the Director to be material to the application.
  - (c) Disclosure: Disclosure of the source of funds, financing, and business income used for the purchase and operation of the applicant's business.
  - (d) Premises Ownership: If the premises are not wholly owned by the applicant, the applicant shall furnish to the Lottery:
    - (A) Any document requested by the Lottery showing the applicant is entitled to possession of the premises; and
    - (B) Such other information as the Lottery may require.
- (4) Alternative Disclosure Process: Notwithstanding section (3) of this rule, pursuant to [ORS 461.300\(2\)\(b\)](#), the Director may recommend, subject to Commission approval, an alternative disclosure process for an applicant when the Director determines such a process would not jeopardize the fairness, integrity, security, and honesty of the Lottery.
- (a) The following applicants are eligible for an alternative disclosure process:
    - (A) A public company or a multi-state chain retailer that is applying for a traditional lottery game retailer contract that meets the following additional criteria of:
      - (i) 30 or more individual retail locations;
      - (ii) Gross annual revenues of \$10 million or more; and
      - (iii) 300 or more employees.
    - (B) An entity wholly owned by a federally recognized tribe; or a subsidiary of an entity wholly owned by a federally recognized tribe.
  - (b) The alternative disclosure process recommended by the Director must be approved by the Commission.
    - (A) If approved by the Commission, the Director may continue the retailer application process. Using supplied disclosure information, the Lottery will conduct an investigation. The Director may determine at any time that additional disclosure is necessary to ensure the fairness, integrity, security, and honesty of the Lottery.
    - (B) If denied by the Commission, the applicant must provide the personal disclosure otherwise required under the Lottery's governing statutes and rules.
- (5) Waiver of Personal Disclosure for Certain Managers: If the applicant for a traditional lottery game retailer contract is a public company or a multi-state retail chain, the Lottery may waive the personal disclosure requirements for the manager of each retailer location unless the Director determines such disclosure is necessary to ensure the fairness, integrity, security, and honesty of the Lottery.

- (6) Compliance Required: An applicant's failure to comply with any application or disclosure requirement may be grounds for denial or rejection of the application.
- (7) Material Change: An applicant must immediately report to the Lottery, in writing, any material changes to the application during the application process. A "material change" means any change that may affect the Lottery's evaluation of the application based on the requirements contained in Division 40 of these rules.
- (8) Waiver: In submitting an application, the applicant expressly waives any claim against the State of Oregon, its agents, officers, employees, and representatives, and the Oregon State Lottery, its Director, agents, officers, employees, and representatives for damages that may result. Each applicant also accepts any risk of adverse public notice, embarrassment, criticism, damages, or claims which may result from any disclosure or publication by a third party of any public information on file with the Lottery.

Statutory/Other Authority: [Or Const, Art XV, § 4\(4\)\(a\)](#), [ORS 461.120](#), [461.130](#), [461.150](#), [461.190](#), [461.200](#), [461.217](#) & [461.300](#)

Statutes/Other Implemented: [Or Const, Art XV, § 4\(4\)](#), [ORS 461.010](#), [461.020](#), [461.100](#), [461.110](#), [ORS 461.120](#), [461.130](#), [461.150](#), [461.190](#), [461.200](#), [461.217](#) & [461.300](#)

AMEND: 177-040-0003

RULE TITLE: Application for Temporary Lottery Retailer Contract

RULE SUMMARY: The Lottery is proposing to amend OAR 177-040-0003 about temporary Lottery retailer contract applications to limit the use of temporary retailer contracts to only certain types of Video Lottery retailer contracts. (Applications for traditional Lottery products will continue to be eligible for temporary contracts.) The type of contracts that will be eligible for temporary contracts are sale of business, change of ownership, or 100% stock buyouts in which the network line is not removed from the retailer premises. The purpose of the change is to reduce the inefficiency associated with installing VLTs at a new location under a temporary contract only to discover the retailer ultimately does not qualify for a regular contract. This is less of a concern with sale of business, change of ownership, and 100% stock buyouts because Lottery has a history with the location.

The Lottery may make additional or alternative amendments in response to information learned or public comment received during the rulemaking process.

The Lottery may make non-substantive amendments to improve the accuracy, clarity, organization, or readability of the rule, or to update the statutory authority and statutes implemented section of the rule.

RULE TEXT:

### **177-040-0003**

#### **Application for Temporary Lottery Retailer Contract**

- (1) General: For the purposes of this rule, "temporary retailer contract" means a contract issued to a retailer for a temporary period. A temporary retailer contract may be formed subject to such special terms, conditions, or limitations as the Director may deem prudent.

(62) ~~Other-Video Lottery~~<sup>SM</sup> Requirements Limitations: Video Lottery retailer contract applications are eligible for temporary contracts if both of the following apply and other requirements of this rule are met:



- (a) The contract for a retailer premises is being terminated due to sale of business, change of ownership, or 100% stock buyout, and the resulting contract application is for the same retailer premises and the network service line is not removed from the retailer premises.
- (b) The applicant and the applicant's business must qualify for the type of Lottery sales sought by the applicant. For example, if the applicant seeks a contract to offer Video Lottery<sup>SM</sup> games, the business must have an appropriate liquor license and an age controlled area that meets the Lottery's requirements. In addition, the business must not be operating as a casino as described in OAR 177-040-0061.

(23)

- (a) Submission: To apply for a temporary retailer contract, an applicant must submit a complete application for a retailer contract.
- (b) Purchase of Existing Business: When an applicant applies for a temporary retailer contract for a business which the applicant is purchasing from an existing Lottery retailer, the applicant must submit to the Lottery a complete application along with any documentation requested by the Lottery regarding the intended purchase prior to the date the applicant takes possession of the premises pursuant to a purchase agreement. Notwithstanding submission of the application prior to the date of possession, the Lottery shall not enter into a temporary retailer contract with the applicant until on or after the date the applicant takes legal possession of the business.

(34) Investigation: When the Lottery accepts the complete application for a temporary retailer contract, the Director will conduct an abbreviated investigation of the applicant and the business. That investigation includes, but is not limited to:

- (a) A computerized criminal background check;
- (b) A credit check using the services of a commercial credit reporting company; and
- (c) An inspection of the business for which the applicant seeks a temporary retailer contract.

(45) Qualifying: An applicant may qualify for a temporary retailer contract if, based on the abbreviated investigation and on the application, all of the following criteria are met:

- (a) The applicant is applying for a retailer contract at a specific location;
- (b) The "Criteria Precluding Entering Into a Contract" described in [OAR 177-040-0005](#) do not apply to the applicant;
- (c) The applicant has no criminal convictions of any kind within five years of the date application is made;
- (d) The applicant has no convictions as described in [OAR 177-040-0010\(3\)](#), "Criminal Behavior";
- (e) The applicant has no Class "A" misdemeanor or felony charges pending against the applicant;
- (f) The applicant has no outstanding judgments, liens, or collections, except those judgments which the applicant is disputing through a legal process;
- (g) The applicant is in compliance with all tax laws;

- (h) The applicant has certified that the business location complies with [OAR 177-040-0070](#), “Retailer Wheelchair Accessibility Program”;
- (i) The applicant has the appropriate Oregon Liquor and Cannabis Commission license, as required by [ORS Chapter 461](#), if applying for a contract to offer Video Lottery<sup>SM</sup> games; and
- (j) There are no apparent factors regarding the applicant to cause the Director to reasonably conclude that the applicant poses an actual or apparent threat to the fairness, honesty, integrity, or security of the Lottery and its games. Factors that may pose a threat include, but are not limited to, any of the following examples:
  - (A) The applicant or key person has one or more criminal convictions, depending on the nature and severity of the crimes involved; or
  - (B) The applicant or key person has been involved in any civil action in which the final judgment indicates that the applicant or key person is not financially responsible, depending on the nature, severity, and recency of the action.

- (56) Other Requirements: Prior to the effective date of the temporary retailer contract, the Director may require the applicant to:
  - (a) Receive training from the Lottery;
  - (b) Establish an electronic funds transfer (EFT) bank account for Lottery funds;
  - (c) Pay all necessary fees associated with the installation of telephone lines and telephone service;
  - (d) Agree to pay all necessary fees associated with amusement device taxes prior to the effective date of a temporary retailer contract; and
  - (e) Agree to be responsible for and to pay all fees in connection with the application, including any cancellation fees for telephone lines and service.

~~(6) Other Video Lottery<sup>SM</sup> Requirements: The applicant and the applicant’s business must qualify for the type of Lottery sales sought by the applicant. For example, if the applicant seeks a contract to offer Video Lottery<sup>SM</sup> games, the business must have an appropriate liquor license and an age-controlled area that meets the Lottery’s requirements. In addition, the business must not be operating as a casino as described in [OAR 177-040-0061](#).~~

- (7) Guarantor: If the applicant is an entity other than either a sole proprietor who is a natural person or a private club as defined in [ORS 471.175\(8\)](#), at least one natural person who is a principal of the applicant entity and who is a key person may be required to personally guarantee all monies owed to the Lottery.
- (8) Bonding: The Director may require the applicant to post a bond, letter of credit, or cash deposit in the form of certified funds prior to the effective date of a temporary retailer contract.
- (9) EFT Transfers: If the Lottery enters into a temporary retailer contract with the applicant, the contract will require the applicant to pay the amount due the Lottery from the sale of Lottery tickets or shares by electronic funds transfer (EFT). In most instances, amounts due the Lottery will be collected via EFT at the end of the fourth day after the close of the Lottery business week. If an applicant operates multiple Lottery retail sites before the effective date of this rule, the routine date of the EFT collection may be set beyond the fourth day after the close of the business week in order to accommodate the needs of the combined sites. The applicant must establish an account for deposit of money from the

sale of Lottery tickets and shares with a financial institution that has the capability of making EFT draws.

- (10) Burden of Proof: The burden for establishing that an applicant qualifies for a temporary retailer contract is on the applicant.
- (11) Termination: In the Director's sole discretion, the Director may immediately terminate a temporary retailer contract if the Director determines that continuing to contract with the applicant is not in the best interest of the Lottery including, but not limited to, when:
- (a) The applicant provided false or misleading material information, or the applicant made a material omission in the application for a retailer contract;
  - (b) The applicant or any key person is convicted of a Class "A" misdemeanor or felony during the term of the temporary retailer contract;
  - (c) An EFT payment is rejected for non-sufficient funds (NSF), or the applicant fails to provide timely information to the Lottery regarding any change of the applicant's EFT bank account;
  - (d) Any other reason contained in the contract or administrative rules that provides a basis for termination of a retailer contract; and
  - (e) When the Director concludes that continuing to contract with the applicant may pose a threat to the fairness, honesty, integrity, or security of the Lottery and its games.
- (12) Length of Temporary Contract: A temporary retailer contract shall be valid for a specific time period for up to 120 days. A temporary retailer contract may, in the Director's discretion, be extended for up to 120 additional days.

Statutory/Other Authority: [Or Const, Art XV, § 4\(4\)\(a\)](#), [ORS 461.120](#), [461.217](#), ~~[461.250](#)~~ & [461.300](#)

Statutes/Other Implemented: [Or Const, Art XV, § 4\(4\)](#), [ORS 461.120](#), [461.217](#), ~~[461.250](#)~~ & ~~[461.300](#)~~, [ORS 461.190](#), [461.215](#)

AMEND: 177-040-0017

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

RULE SUMMARY: The Lottery is proposing to amend OAR 177-040-0017 about additional requirements that apply to Video Lottery retailer contract applications (in contrast to applications for a contract to sell traditional Lottery products). The proposed amendments establish new requirements moving forward for most Video Lottery retailer contract applications. Specifically, the proposed amendments:

- Exempt certain Video Lottery retailer contract applications from certain requirements of the rule including:
  - Applications relating to sale of business, change of ownership, and 100% stock buyout so long as the network line is not removed from the retailer premises.
  - Applicants from tribally owned businesses that qualify for alternative disclosure under OAR 177-040-0001(4)(a)(B).
- Establish a waitlist for persons interested in applying for a Video Lottery retailer contract.
  - To be added to the waitlist, the rule would require interested and eligible applicants to submit an interest form on the website designated by the Lottery. Interested applicants will be ordered on the waitlist based on the date the Lottery received their interest form.

- Requires an applicant's business to have been open and operating for at least nine months prior to initiating an application. Allow the Lottery to waive the requirement to be open and operating for nine months if a retailer has had two or more Video Lottery retailer locations for at least two years; the new location will have the same ownership and business model; and contracting with the applicant for an additional location will not jeopardize the fairness, integrity, security, and honesty of Lottery's operations, as determined by the Assistant Director for Security or designee.
- Allow any interest forms that were submitted in 2022 but not selected to move forward in the application process to be added to the top of the waitlist.
- Direct Lottery to determine each quarter how many applications will be processed from the waitlist, if any, and then to process that number of applications from the waitlist in the order received except that Lottery may prioritize applicants based on sales potential and geographic considerations in ORS 461.300.

The Lottery may make additional or alternative amendments in response to information learned or public comment received during the rulemaking process.

The Lottery may make non-substantive amendments to improve the accuracy, clarity, organization, or readability of the rule, or to update the statutory authority and statutes implemented section of the rule.

RULE TEXT:

#### **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. At any point in the application process, 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.

(2) Exceptions:

(a) When the contract for a retailer premises is terminated due to sale of business, change of ownership, or 100% stock buyout, the resulting contract application for the same retailer premises is exempt from the interest form, waitlist, and open and operating requirements of this rule so long as the data line is not removed from the retailer premises.

(b) A Video Lottery retailer contract applicant who meets the requirements for the alternative disclosure process authorized by OAR 177-040-0001(4)(a)(B) is exempt from the interest form, waitlist, and open and operating requirements of this rule.

~~(2) Additional Video Lottery Retail Application Requirements:~~

~~(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.~~

(3) **Interest Form Required.** On July 1, 2023, the Lottery shall establish a Video Lottery Retailer Contract Application Waitlist. The waitlist shall be comprised of persons described in section (5) of this rule and any other interested applicant who has submitted an interest form to the Lottery at <https://www.oregonlottery.org/vlform/> and who meets the requirements of this rule. Interested applicants will be ordered on the waitlist based on the date their interest form was received by the Lottery. The Lottery may remove an interested applicant from the waitlist if the Lottery determines the person does not meet the requirements in this section or if the applicant withdraws from the process or is otherwise determined by the Lottery to be uninterested or ineligible.

- (a) An interested applicant must provide all information requested by the Lottery on the interest form so the Lottery can verify the potential applicant meets Lottery retailer contract requirements such as, but not limited to, business registration, OLCC licensure, and willingness to pay a nonrefundable network service installation fee if selected to start the application process.
- (b) Unless an exception is approved, an interested applicant must attest that the establishment where Video Lottery terminals will be placed if approved for a Video Lottery retailer contract has been open to the public and operating continuously for nine months as described in section (4) of this rule. Current Video Lottery retailers who may qualify for an exception under subsection (4)(b) of this rule must provide all requested information regarding their current Video Lottery retailer locations.

(4) **Requirement to be open to the public and operating continuously for at least nine months.** Unless an exception is approved under subsection (b) of this section, the establishment where Video Lottery terminals will be placed if approved for a Video Lottery retailer contract must have been open to the public and operating continuously for at least nine months. Lottery may require any documentation or explanation from the applicant that Lottery deems necessary to determine whether the applicant's business has been open to the public and operating continuously for the required period.

- (ba) For the purpose of ~~paragraph (a)(A)~~ of this rule section, "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 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. 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 the application process is initiated, the period of operations at the old location shall be considered if:
- (i) The new location is in essentially the same community as the old location and serves essentially the same customer base; and
  - (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.
  - (iii) The burden of proof for establishing subsections (A) and (B) of this subsection is on the applicant.

(b) The Assistant Director for Security or designee may waive the requirement that a business be open and operating for nine months prior to application only if the following criteria apply.

(A) The applicant currently has active Video Lottery retailer contracts at two or more locations;

(B) The applicant has held active Video Lottery retailer contracts at two or more locations for at least two years;

(C) The applicant's new location(s) have the same ownership as the locations identified in subsections (a) and (b) of this section;

(D) The applicant's new location(s) will have the same business model as other current locations; and

(E) Contracting with the applicant for an additional location will not jeopardize the fairness, integrity, security, and honesty of Lottery's operations, as determined by the Assistant Director for Security or designee.

(5) **Other Applicants Eligible for Waitlist.** Any interest form submitted to the Lottery at <https://www.oregonlottery.org/vlform/> by December 30, 2022 at 11:59 p.m., but not otherwise selected to move forward in the Video Lottery retailer contract application process, will be placed at the front of the waitlist. These interested applicants will be ordered on the list based on date the Lottery received their interest form with those submitted first in time listed before interest forms submitted later in time.

(6) **Processing the Waitlist.** Each quarter, the Director shall determine if there is sufficient Video Lottery Terminal inventory to process additional Video Lottery retailer contract applications, and whether such additional contracts will maximize revenue to benefit the public purposes described in Article XV, section 4, of the Oregon Constitution, commensurate with the public good.

- (a) If applications will be processed, the Director shall determine the number that will be processed in the current or coming quarter, and Lottery shall process applicants from the waitlist in the order received. (The order received is based on the date stamp indicating when the interest from was received by the Lottery after being submitted by the applicant at <https://www.oregonlottery.org/vlform/>.)
- (b) Notwithstanding subsection (a), the Lottery may prioritize an applicant on the waitlist if the Lottery has reason to believe that approving a contract for that applicant may meet any of the following goals in ORS 461.300:

  - (A) The applicant would best serve the public convenience by improving the availability of Video Lottery games in a particular geographic area. (For example, the Lottery may consider VLTs per capita or other metrics and prioritize applicants from geographic areas that are likely to best support additional Video Lottery retailer locations.)
  - (B) The applicant would promote the sale of tickets or shares because, for example, the applicant or applicant's business model has demonstrated success in selling Video Lottery games.
- (c) Unless otherwise determined uninterested or ineligible, any applicant selected from the waitlist shall have the opportunity to complete the full retailer contract application process, including the background check process. Selection to apply does not guarantee the applicant will be approved for a contract and such approval remains subject to Lottery's discretion.

**(37)** 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.

**(48)** 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.

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, 461.217, 461.300, ORS 461.150, 461.200, 461.215, 461.217, 461.300

AMEND: 177-045-0030

RULE TITLE: Video Lottery Game Terminals

RULE SUMMARY: The Lottery is proposing to amend OAR 177-045-0030 to increase the weekly sales requirement for each Video Lottery retailer from a minimum of \$2,667 in average dollars played per week per terminal to \$10,000 in average dollars played per week per terminal. The rule allows Lottery to remove one or more VLTs from a retailer if the retailer is unable to meet the weekly sales requirement. VLTs that are removed may be reallocated to other Video Lottery retailers (who do not yet have six VLTs) or installed in new locations, where Lottery expects the VLT would be likely to generate additional sales and meet the new weekly requirement. While most current retailers will meet the higher sales requirement, about 12.5% (as of this writing) do not. Those retailers (about 250) will be at risk for having a VLT reallocated, but Lottery expects most of the play that was occurring on the low-performing VLT (77%) will migrate to VLTs that remain at the retailer's premises. (Lottery does not remove a VLT for failure to meet the sales requirement if the retailer only has one VLT.)

The Lottery may make additional or alternative amendments in response to information learned or public comment received during the rulemaking process.

The Lottery may make non-substantive amendments to improve the accuracy, clarity, organization, or readability of the rule, or to update the statutory authority and statutes implemented section of the rule.

RULE TEXT:

### **177-045-0030**

#### **Video Lottery Game Terminals**

- (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 dollars played 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 ~~\$2,667~~10,000 in average dollars played 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. Dollars played video sales means the amount wagered on Video Lottery games at the retailer's premises. 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 secondhand 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 and Cannabis 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.

Statutory/Other Authority: [Or Const, Art XV, § 4\(4\)\(a\)](#), [ORS ~~183.325, 183.335, 461.120, 461.130, 461.150, 461.200, 461.217, 461.260 & 461.300~~](#)

Statutes/Other Implemented: [Or Const, Art XV, § 4](#), [ORS ~~461.100, 461.120, 461.130, 461.150, 461.200, 461.202, 461.215, 461.217, 461.260, 461.300, & ORS 461.215 & 461.500~~](#)

REPEAL: 177-045-0035

RULE TITLE: Temporary Pause on Additional Video Lottery Retailer Locations

RULE SUMMARY: The Lottery is proposing to repeal OAR 177-045-0035, which imposed a temporary pause on processing applications for additional Video Lottery retailer locations with some exceptions. This rule was intended to be a temporary pause (hence the title) to allow Lottery to address short-term VLT inventory issues and develop a long-term comprehensive plan to improve VLT inventory management in the future.

During the time the pause was in effect, the Lottery was able to (1) resume normal equipment management activities that had been suspended during COVID; (2) secure funding to purchase additional VLTs in FY 22; and (3) develop a long-term plan to manage equipment moving forward. That plan includes the policy changes described in this notice that establish a new process for processing applications and managing inventory going forward, including establishing a waitlist for interested applicants; raising the standards for applicants to apply; and increasing the sales performance expectation of VLTs currently in the field. These changes plus the plan to set aside funds each year to be available to invest in upgraded VLTs eliminate the need for the total pause on applications. (Note that under OAR 177-040-0017 as amended, if the Lottery does experience inventory shortfalls in the future for whatever reason, the Director may determine that zero applications will be processed in any given quarter.)

RULE TEXT:

### 177-045-0035

#### Temporary Pause on Additional Video Lottery Retailer Locations

- ~~(1) Pursuant to the Director's authority to responsibly manage Video Lottery game terminals and based on the considerations described in OAR 177-045-0030, the Director has determined that the Lottery does not have adequate inventory of Video Lottery terminals and related equipment to accommodate new Video Lottery retailer locations, except as provided in section (2) of this rule. Therefore, effective December 20, 2021, except as provided in section (2) of this rule, the Lottery will not accept applications from new Video Lottery retailer applicants or applications from current Video Lottery retailers to add one or more additional locations or terminals. The Lottery will continue to accept applications for traditional Lottery product sales and will process sale of business, change of ownership, and 100 percent stock buyouts for Video Lottery retailers as normal.~~
- ~~(2) Exception: The Lottery may accept new Video Lottery retailer applications that meet the requirements for the alternative disclosure process authorized by OAR 177-040-0001(4)(a)(B) provided terminals and related equipment are available.~~
- ~~(3) Pending Applications: The Lottery may place applications received and initiated prior to December 20, 2021 on a waitlist and process when the Lottery determines inventory is sufficient. Applications placed on a waitlist pursuant to this section will be processed based on date received, with the applications received first in time going first as inventory allows.~~
- ~~(4) The Director shall suspend the temporary pause described in this rule when the Director determines that the Lottery has adequate inventory to accommodate additional Video Lottery retailer locations and determines that such additional Video Lottery retailer locations would maximize Lottery revenue commensurate with the public good.~~

Statutory/Other Authority: Or Const, Art XV, § 4(4)(a), ORS 183.325, 183.335, 461.120, 461.130, 461.150, 461.200, 461.215, 461.217, 461.260, 461.300, 461.500 & OAR 177-010-0025

Statutes/Other Implemented: Or Const, Art XV, § 4, ORS 183.310, ORS 183.325, 183.335, 461.120, 461.130, 461.150, 461.200, 461.215, 461.217, 461.260, 461.300, 461.500 & OAR 177-010-0025