



Memo

Date:	June 16, 2023
To:	Oregon State Lottery Commissioners
From:	Kris Skaro, rules and policy analyst
Subject:	Motion to Adopt VLT Inventory Management Rule Changes (OAR 177-040-0001; 177-040-0003; 177-040-0017; 177-045-0030; 177-045-0030)

Background:

In April, Lottery proposed rule changes to support the next phase in VLT inventory management. Specifically, Lottery proposed to lift the pause on new Video Lottery locations that had been in effect since December 19, 2021, along with policy changes intended to improve the sustainability, profitability, and efficient of the Video Lottery Program including:

- Establish a waitlist for Video Lottery retail contract applicants. Lottery will determine if applications will be accepted and, if so, will select applicants from the waitlist to move forward with the contract application process.
- Increase the weekly sales requirement for Video Lottery retailers to an average of \$10,000 dollars played per week per VLT. VLTs that have average dollars played below that amount could be at risk for having one or more VLTs removed, except that Lottery will not remove a VLT if a retailer only has one.
- Unless a waiver is approved, require an applicant to be open and operating for at least nine months before applying for Video Lottery. The waiver is for current retailers with two or more locations for two or more years who are in good standing and are seeking to open a new location with the same ownership and business model.
- Limit the use of the temporary contract process for Video Lottery retail contract applicants with some exceptions for sale of business, change of ownership, and the like.

Rulemaking Process and Public Comment:

The Lottery filed notice of the proposed rule change on April 17, 2023 with the Oregon Secretary of State and notified interested parties, media contacts, and certain legislators as required by law. The Lottery also emailed all current ~2,000 Video Lottery retailers to notify them about the proposed changes and the opportunity to comment to the Lottery during the rulemaking process. Account managers also visited all current Video Lottery retailers in person and provided a leave-behind FAQ about the rule changes and how to comment. The Lottery provided six weeks for the public to comment in writing and held a virtual public rulemaking hearing to take verbal comments.

The Lottery received 39 comments during the rulemaking process, which are summarized in the enclosed Final Rulemaking Report. All comments were provided to the Commission and Interim Director Wells for their review and consideration.

Lottery Response to Public Comment

The Lottery thanks everyone who took the time to share their comments with the Lottery on the proposed rules. In response to most comments from current retailers, Lottery account managers visited the retailer in person to acknowledge their concerns and answer questions. These activities were also documented for the record.

The Lottery considered all comments received and provides the following responses:

In response to the comment that the quarterly process will make it difficult for businesses to plan, the Lottery agrees and updated the rules to require the director to decide the number of applications for Video Lottery contracts that it plans to process “on July 5, 2023, and *no less than annually thereafter.*” This allows, at a minimum, an annual target for the number of contract applications the Lottery will process based on inventory, revenue considerations, and other factors. Although there is never a guarantee a business will be able to apply or be approved for a contract, the Lottery’s intent is that this gives more information for businesses to plan.

As to the comments opposing the increase in the sales floor, the Lottery continues to recommend increasing the sales threshold to \$10,000. The Lottery chose the \$10,000 threshold to ensure the state of Oregon is earning a reasonable rate of return on the considerable investment each VLT requires. The sales threshold has not been updated in well over a decade and Lottery believes doing so now is consistent with its mission to maximize revenue for the public programs that rely on revenue from Video Lottery.

Further, almost 90% of current retailers already meet the \$10,000 sales threshold. This suggests this is a reasonable sales target. As to the impact to retailers who lose a VLT, the average VLT in a retail site under the threshold is played less than 60 minutes per day. This means that when that VLT is removed, most play could reasonably be accommodated by the VLTs that remain at the location. (As a reminder, Lottery does not remove VLTs if a retailer only has one.) This likely migration of play mitigates the impact to the total commissions earned by the retailer. Historical data from VLT removals performed between 2015 and 2019 shows some retailers see a small drop in commissions (~5%); others see a small increase; and others see little change at all.

Lottery has committed to make equipment management changes gradually to allow close monitoring and evaluation of the impact of removals and reallocations.

Final Rules Recommended by the Director:

The Permanent Administrative Order is enclosed and shows the final rule text, which is similar to the proposed rules but with the following changes:

- As mentioned previously, Lottery updated the rules to require Lottery to determine whether applications will be accepted and, if so, how many, “on July 5, 2023, and no less than annually thereafter.” This replaces the quarterly process reflected in the proposed rules.
- Lottery clarified that an applicant must be open and operating to start an application but created an exception for an applicant who is closed for repairs, remodeling, or renovation when

they are selected from the waitlist. These applicants can keep their place in line so long as they reopen within 90 days.

- Lottery made a minor edit to clarify that for a business that is newly purchased or that moves its location, the time the business operated under the previous owner or at the previous location will count toward the nine-month open and operating requirement provided the business is operated as the same or similar type of business and the business offered meals and on-premise consumption of alcohol. (The proposed rules and current language in OAR 177-040-0017 suggested this was limited to 90 days prior to initiating an application, which was not Lottery's intent.)

Interim Director Wells has reviewed these materials and considered all public comment received. While he appreciates the concerns raised by the commenters, he believes the rules are consistent with Lottery's mission to maximize revenue commensurate with the public good and, additionally, that most retailers will benefit from a more efficient and profitable Video Lottery Program. Thus, he recommends the Commission amend and repeal the rules as presented here to be effective on July 1, 2023.

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



Rulemaking Report

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

Notice of Proposed Rulemaking

The Lottery filed a Notice of Proposed Rulemaking with the Secretary of State on April 17, 2023 indicating that the Lottery proposed to repeal and amend rules as described in the Notice to support the next phase in Lottery's Video Lottery Terminal (VLT) equipment management approach. The rule change lift the pause on processing applications for Video Lottery retailer contracts and adopt other policy changes to support the long-term sustainability of the Video Lottery Program including: establishing a rolling waitlist for interested applications that Lottery can process periodically as inventory allows; increasing contract application requirements; and limiting the use of the temporary contract process.

Amend: OAR 177-040-0001	General Application Requirements
Amend: OAR 177-040-0003	Application for Temporary Lottery Retailer Contract
Amend: OAR 177-040-0017	Additionally Video Lottery Retailer Application Requirements and Lottery Authority
Amend: OAR 177-045-0030	Video Lottery Game Terminals
Repeal: OAR 177-045-0035	Temporary Pause on Additional Video Lottery Retailer Locations

Rulemaking Timeline

- **4/17/23** Filed notice with Secretary of State.
- **4/17/23** Notice sent to Lottery's Interested Parties (email) and legislators per ORS 183.335(15).
- **4/18/23** Notice sent to Lottery's interested parties (postal mail) and media outlets at the Capitol Press Room.
- **4/17/23** Email sent to all Video Lottery retailers; account managers began distributing FAQ in person.
- **4/21/23** Informed the Commission of proposed rules; proposed rules in meeting materials and listed on Commission agenda.
- **5/1/23** Notice published in Secretary of State Bulletin.
- **5/16/23** Public rulemaking hearing held.
- **5/22/23** Email sent to all Video Lottery retailers to remind them of the public comment deadline.
- **5/31/23** End of written comment period at 5 p.m.
- **6/23/23** Rules listed on Commission agenda; request Commission approval to adopt rules as presented.
- **TBD** Permanent Administrative Order filed online with the Secretary of State pending Commission approval on 6/23/23.
- **7/1/23** Permanent rules effective pending Commission approval on 6/23/23.

Public Comment Opportunities and Summary

The Lottery provided six weeks for the public to comment in writing and held a virtual public rulemaking hearing to take verbal comments. The Lottery received 36 written comments by email and postal mail and three people testified at the virtual rulemaking hearing on May 16, 2023. All written comments and a video recording of the rulemaking hearing are saved for the record and available for review.

A summary of all comments received and full text of written comments were provided to the Commission and Interim Director Wells for their review and consideration.

To summarize for this report, most comments (37 of 39) were opposed to increasing the weekly sales requirement. Retailers said that losing a VLT would be devastating to their business, even leading their business to close. Commenters felt it was unfair to impose this new requirement during such difficult economic conditions, such as inflation, labor shortages, and supply chain issues. Some requested that Lottery start with a smaller amount. Some fraternal organizations asked to be exempt or subject to a lower amount. Other commenters said the changes are unfair to rural and small businesses and benefit large corporate retailers. While some commenters are current retailers who would be at risk to lose a VLT under the rule change, others were current retailers whose average sales are above the proposed \$10,000 threshold.

Some commenters supported lifting the pause on processing applications for new Video Lottery locations, while other commenters opposed lifting the pause, since more competition will make it harder for current retailers to meet the new sales requirement.

Two commenters said high-performing retailers deserve more VLTs and it's frustrating to have to wait.

The Oregon Restaurant and Lodging Association (ORLA), which represents some current and prospective Video Lottery retailers, supported lifting the pause but said the proposed rules do not maximize revenue because they create barriers to entry, such as the requirement to be open and operating for nine months before applying for a contract, and make it impossible for businesses to plan because the quarterly determination creates uncertainty as to whether any applications will even be processed in the coming quarters. ORLA recommended instead that Lottery lift the pause and set an annual target for increasing the total number of Video Lottery retailers. ORLA said all other policy changes should wait until Lottery can get its retailer base up. ORLA also said increasing the sales requirement in current economic conditions is unfair to businesses. ORLA said that change should wait until after Lottery has sufficiently increased the total number of Video Lottery retailers to meet current demand.

Lastly, one commenter expressed support for all changes after discussing with Lottery staff.

In response to most comments from current retailers, the retailer's assigned account manager visited the retailer to acknowledge the retailer's concerns and answer questions. Additionally, in response to the comment about the quarterly process creating uncertainty for businesses, the Lottery changed the rules to require Lottery to make a determination about whether applications will be processed and, if so, how many "on July 5, 2023, and no less than annually thereafter."

Director's Recommendation

Interim Director Wells considered all comments received and reviewed the rules as reflected in the enclosed Permanent Administrative Order. The rules are substantially similar to the rules proposed in the Notice filed by the Lottery in April, with some changes made in response to public comment or to clarify Lottery's intent. Interim Director Wells recommends the Commission permanently adopt, amend, and repeal the rules as presented to them at the June 23, 2023 meeting of the Oregon State Lottery Commission, to be effective on July 1, 2023.

PERMANENT ADMINISTRATIVE ORDER¹

CHAPTER 177 OREGON STATE LOTTERY

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

EFFECTIVE DATE: 07/01/2023

AGENCY APPROVED DATE: Pending Commission approval

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RULES:

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 amending OAR 177-040-0001 to add a note to direct readers to additional requirements for some Video Lottery Retailer Contract Applications that are described in OAR 177-040-0017.

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.

¹ This Permanent Administrative Order is draft pending Commission approval. If approved, the Lottery's official order will be filed with the Oregon Secretary of State through their online system. Once filed and accepted, it will be available at <https://secure.sos.state.or.us/oard/filingSearch.action> under chapter 177.

- (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 amending 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 also updated the statutory authority and statutes implemented sections 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 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 LotterySM 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^{SAA} 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 LotterySM 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 LotterySM 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; Or. Const. Art. XV & Sec. 4(4)
 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 amending 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 amendments establish new requirements moving forward for most Video Lottery retailer contract applications. Specifically, the amendments:

- (1) Exempt certain Video Lottery retailer contract applications from some of the requirements of the rule including:
 - (a) 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.
 - (b) Applicants from tribally owned businesses who are eligible for alternative disclosure under OAR 177-040-0001.
- (2) Establish a waitlist for persons interested in applying for a Video Lottery retailer contract. To be added to the waitlist, the rule requires 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.
- (3) Require an applicant’s business to have been open and operating for at least nine months prior to initiating an application. Allows 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.

(4) 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.

(5) Direct Lottery to determine on July 5, 2023, and no less than annually thereafter, 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. Allows the director to make new determinations periodically (but no less than annually) and adjust determinations when necessary.

(6) Clarify that when an applicant is selected from the waitlist, they must be currently open and operating to start an application unless they are closed for remodel, renovation, or repair, in which case the Lottery may hold their place in line as long as the business opens within 90 days.

(7) Update the statutory authority and statutes implemented section of the rule.

The amendments in OAR 177-040-0017 described in this Permanent Administrative Order are substantially similar to those proposed in the Notice of Proposed Rulemaking on April 17, 2023. However, some changes and clarifications were made during the rulemaking process, including changing from a quarterly process to a no-less-than-annually process. This is in response to a comment that the quarterly process may make it difficult for businesses to plan. Additionally, the rule was clarified as to whether a person selected from the waitlist needed to be currently open and operating and, if so, whether Lottery would make an exception for renovations or repairs, since an applicant cannot predict when they will be selected from the waitlist. The language in subsection (6)(d) is intended to clarify that requirement and exception. Lastly, regarding the ability to include the time a business was open and operating when under prior ownership or at a different location toward the nine-month open and operating requirement, the proposed text (and current language in OAR 177-040-0017) suggested that was limited to 90 days prior to initiating the application. That is not Lottery's intent; therefore, that limitation has been removed in the final amended 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 5, 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 meet 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 the 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.** On July 5, 2023, and no less than annually thereafter, 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. The Director shall make these determinations no less than annually; apart from that requirement, the frequency of these determinations shall be left to the Director's discretion.

(a) If applications will be processed for a given time period, the Director shall determine the number that will be processed and Lottery shall process applicants from the waitlist in the order received. The number of applications to be processed for a given time period may be subject to adjustment at the Director's discretion, based on availability of inventory and other relevant considerations. (The order received is based on the date stamp indicating when the interest form 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.

(d) In addition to the requirements in section (4) of this rule:

(A) Except as provided in paragraph (B) of this subsection, any applicant selected from the waitlist must be currently open and operating to initiate an application.

(B) If the business is not open and operating due to a remodel, renovation, or repair, the Lottery may allow the business no more than 90 days to become open and operating to initiate the application process.

- (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 amending 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 11% (as of this writing) do not. Those retailers (about 240) 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 also updated the statutory authority and statutes implemented sections 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: ~~OAR 177-010-0025,~~ 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 repealing 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 time period.)

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