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FILING CAPTION: Updating requirements for Video Lottery retailers relating to the constitutional prohibition on casinos

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RULES:

177-040-0050, 177-040-0061

AMEND: 177-040-0050

NOTICE FILED DATE: 11/13/2024

RULE SUMMARY: The Lottery is amending OAR 177-040-0050 about retailer duties. The changes impose basic food service requirements on two types of Video Lottery retailers that are most at risk for violating Lottery's casino prohibition rule: limited-menu retailers (LMRs) and café/small eateries (CSEs) as defined in the rule. Statutory references are also updated.

CHANGES TO RULE:

177-040-0050
Retailer Duties ¶¶

(1) General: This rule contains duties to be performed by a Lottery retailer beyond those duties described in the Lottery retailer contract. The duties listed herein are not meant to be exclusive. Other duties and requirements for retailers may be contained elsewhere in OAR Division 177, ORS Chapter 461, or in the Lottery retailer contract.¶¶

(2) All Retailers: All Lottery retailers shall:¶¶

(a) Stock Equipment: Keep all Lottery equipment on the retailer's premises stocked with a variety of Scratch-it tickets, play slips, computer-generated tickets, and any other Oregon Lottery product required to be sold. Unless exempted by the Lottery, if a Lottery retailer fails to stock or replenish these items as they are made available for sale by the Lottery, or as they are depleted because of purchase or use, the Lottery may remove the equipment.¶¶

(b) Perform Minor Maintenance: Replace ticket stock and clear paper jams as may be required for any of the equipment provided by the Lottery for the sale of Lottery tickets or shares.¶¶

(c) Maintain Paper Stock: Install and use only approved Lottery-provided paper stock which has been specifically assigned to the selling retailer when selling Lottery tickets and shares.¶¶

(d) Obtain Permits: Be required to arrange for and obtain all necessary permits required by federal, state, and local governments for electrical installation, electrical power, telephone service, fiber optic lines and connections, and coaxial cable and connections required to sell Lottery tickets or shares at the retail site.¶¶

(e) Pay Amounts Due: Pay the amount due to the Lottery for the sale of Lottery tickets or shares by the use of an

electronic funds transfer (EFT). In most instances, this EFT shall occur at the end of the fourth day after the close of each Lottery business week. When 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.¶¶

(3) Traditional Lottery Game Retailers: A Lottery retailer authorized to sell traditional Lottery games is required to:¶¶

(a) Scratch-It Tickets:¶¶

(A) Activate Scratch-it tickets prior to sale.¶¶

(B) Validate Scratch-It tickets presented to the retailer by a player through equipment provided by the Lottery connected to the Lottery's central computer system.¶¶

(C) Destroy winning tickets after validation and payment of the prize; (Any Lottery retailer who does not destroy a winning ticket after validation and payment of the prize is liable for a prize paid by another Lottery retailer who subsequently pays the ticket.)¶¶

(D) Return non-winning tickets to the player.¶¶

(b) Draw Game Validation: Validate a Draw game ticket through the Draw game terminal before paying a Draw game prize.¶¶

(c) Underage Play: Monitor Lottery player-operated vending machines, as defined in OAR 177-045-0000, to prevent underage play.¶¶

(4) Video Retailers: A Video Lottery game retailer is required to:¶¶

(a) Cash Slip Validation: Validate any Video Lottery cash slip presented for payment that was issued at the retailer's location, through the Lottery's on-site video validation terminal before paying a Video Lottery prize, except for those cash slips required to be validated and paid by the Lottery.¶¶

(b) Restrict Visibility: Restrict Video Lottery game terminals from visibility from areas outside of the business and from view of dining areas or other areas where minors are permitted to linger.¶¶

(c) Age-Posted Area: Maintain Video Lottery game terminals in an area of the business that is prohibited to minors. The area must be posted as such by the Oregon State Lottery or the Oregon Liquor and Cannabis Commission. This restriction against minors does not apply to minors who qualify under the exceptions permitted by the Oregon Liquor and Cannabis Commission for access to areas normally prohibited to minors.¶¶

(5) Video Retailers Classified as an LMR or CSE: ¶¶

(a) A Video Lottery game retailer classified by the Lottery as a limited-menu retailer (LMR) or caf /small eatery (CSE) under subsection (b) of this section shall meet the following minimum food and alcohol service requirements:¶¶

(A) The establishment shall have a menu that is visible to the public that offers at least five different meals (if classified as an LMR) or 10 different meals (if classified as an CSE). To meet this requirement, the establishment must have the space, food preparation area, inventory, equipment, and staff to serve the menu items during all hours of operation. The food must be prepared by the business.¶¶

(B) The establishment must have at least eight dining seats available. Seats at bars or seats designated for a VLT do not qualify as a dining seat.¶¶

(C) The establishment may not discourage or attempt to discourage a person from ordering food. Examples of discouraging food service include but are not limited to: A failure to take, prepare, cook, or deliver a food order in a timely manner; clearly over-pricing food; offering or serving unpalatable food; and failing to provide food service.¶¶

¶¶

(b) Classification as an LMR or CSE: ¶¶

(A) Except as provided otherwise in paragraph (C), the Lottery shall categorize a retailer as a limited-menu retailer (LMR) if the business offers less than 10 different meals and has less than \$100,000 in combined gross annual sales of food, non-alcoholic beverages, and alcohol sales.¶¶

(B) Except as provided in paragraph (C), the Lottery shall classify a retailer as a caf /small eatery (CSE) if the business offers less than 15 different meals and has less than \$200,000 in combined gross annual sales of food, non-alcoholic beverages, and alcohol sales.¶¶

(C) The Lottery may determine that a business is not an LMR or CSE if the primary activity of the business is the on-premise sale of alcoholic beverages for immediate consumption, as determined by the Lottery based on a visual inspection of the premises and a review of the gross alcohol sales of the business.¶¶

(c) Definitions: For purposes of this rule:¶¶

(A) "Bar" means a counter at which the preparation, pouring, serving, sale, or consumption of alcoholic beverages is the primary activity.¶¶

(B) "Dining seats" means seating at tables or food counters, at which the primary activity is the consumption of food, located in areas of the establishment open to the public that will accommodate a place setting consisting of a plate or dish, glassware, napkin, and utensils for each seat.¶¶

(C) "Different meals" means meals that the Lottery determines differ in their primary ingredients or method of

preparation. For example, a turkey sandwich differs from a salami sandwich, a beef burger differs from a turkey burger, a pepperoni pizza differs from a cheese pizza, and fried chicken differs from baked chicken. Different sizes of the same item are not considered different under this rule. For example, a large cheese pizza is not different from a small cheese pizza and a large hot dog is not different from a small hot dog.

(D) "Meal" means a food item, or combination of food items, prepared or cooked on the premises that the Lottery determines is a main course and is a serving of food sufficient to satisfy the appetite of one individual. Food items that are appetizers, snacks, and desserts do not qualify as a meal. Examples include, but are not limited to, popcorn, peanuts, chips, a serving of food that is not sufficient to satisfy the appetite of one individual, and food items offered as other than a meal.

(6) Sanctions: The Director may sanction a Lottery retailer for the loss, damage, or destruction of any winning game ticket or share. This includes, but is not limited to: Imposing a requirement for remedial training for the retailer or the retailer's employees, and any other actions for failure to perform contract duties or requirements as described in the Lottery retailer contract or OAR Chapter 177.

Statutory/Other Authority: OR Const., Art. XV, § 4(4)(a), ORS 461.120, 461.217, 461.250, 461.300, 461.715, 461.719

Statutes/Other Implemented: OR Const., Art. XV, § 4(4), ORS 461.215, 461.560, ORS 461.120, 461.217, 461.250, 461.300, ~~461.560~~, 461.715, 461.719

NOTICE FILED DATE: 11/13/2024

RULE SUMMARY: The Lottery is amending OAR 177-040-0061 about the constitutional prohibition on casinos. The changes would remove the "other factors" Lottery considers whenever a Video Lottery retailer's annual non-Lottery sales are less than 50 percent of their total income. The deleted factors are replaced with more objective criteria, such as the number of menu items the establishment offers; whether the establishment offers and advertises non-Lottery products; and whether the establishment's name has gambling references. Statutory references are also updated.

CHANGES TO RULE:

177-040-0061

Casino Prohibition ¶¶

(1) General: The operation of a casino is constitutionally prohibited in the state of Oregon. It is the policy of the Oregon State Lottery to place Video Lottery terminals only in an establishment that does not operate as a casino. The purpose of this rule is to provide a framework and a process for determining when an establishment is operating or may operate as a casino. This framework and process are in addition to other methods the Oregon State Lottery uses to prevent Video Lottery retailers from operating an establishment as a casino. Other methods include, but are not limited to:¶¶

(a) A limit on the number of Video Lottery terminals in any establishment;¶¶

(b) Limiting public view of Video Lottery terminals;¶¶

(c) A limitation on certain advertising and promotional activities by retailers; and¶¶

(d) Considering the sale of Lottery tickets and shares by retailers an adjunct to their businesses.¶¶

(2) Definitions: For purposes of this rule:¶¶

(a) "Establishment" means any single location in which Video Lottery games are operated or which is identified in a Video Lottery Retailer Application as the proposed site for such activity. An establishment must be owned or operated by a person licensed to sell alcoholic beverages for consumption in a specific age-controlled area of the establishment. The final determination of what constitutes an establishment shall be made by the Director.¶¶

(b) "Total Annual Lottery Compensation" means the actual, or in the case of an applicant, the reasonably projected total annual compensation received from the Lottery for the sale of all Lottery tickets and shares at the establishment over a selected twelve-month period, including, but not limited to, compensation resulting from participation in Lottery incentive and bonus programs, as described in the Retailer Contract, other than those programs awarding bonuses on the basis of the sale of winning and validated Scratch-it or On-Line tickets for which a prize of \$10,000 or more is paid.¶¶

(c) "Annual Non-Lottery Sales" means the actual, or in the case of an applicant, the reasonably projected revenue from the sale of products or services other than Lottery tickets and shares to retail customers at the establishment over a selected twelve-month period. Projected sales will only be deemed reasonable if they are based on a detailed business plan which is fact and evidence based or meets industry standards for business plans. Only the sale of products or services to retail customers in return for which the establishment receives cash or any instrument evidencing cash consideration shall be included in the calculation of annual non-Lottery sales.

Examples of products and services not considered for annual non-Lottery sales for purposes of this rule include, but are not limited to:¶¶

(A) The sale of products or services which are not usually sold by or associated with the type of retail establishment being reviewed. For example, the sale of a car by a tavern would not be included;¶¶

(B) The wholesale sale of products. "Wholesale" means the sale of goods in quantity, as to retailers or jobbers, for resale to the public. This includes the sale or transfer of cigarettes or other products between two or more establishments operated by the same retailer;¶¶

(C) The gifting of complimentary or promotional products; or the value of promotional discounts/coupons;¶¶

(D) The retail sale of products or services sold or rendered outside of the establishment (such as catering) unless the work is substantially completed at the establishment and the services are provided substantially by employees of the establishment;¶¶

(E) The sale of products or services for which the retailer receives a commission, except that the amount of the commission received may be considered; and¶¶

(F) Income from other than the sale of a product or service (such as a cover charge) will not be included in the calculation of annual non-Lottery sales.¶¶

(3) Director's Casino Determination: The Director shall determine whether an establishment is operating or may operate as a casino before entering into a Video Lottery contract for that establishment. The Director may also

initiate a review of an existing Video Lottery retailer whenever the Director has reason to believe that an establishment is operating as a casino, or may operate as a casino. The Director may rely on whatever resources and information are available in deciding to initiate a review of an existing Video Lottery retailer. A Video Lottery retailer, or person applying to become a Video Lottery retailer, has the burden of proof to show to the satisfaction of the Director that an establishment is not operating, or will not be operating, as a casino. The Director's determination is final.¶¶

(4) Conclusive Evidence that an Establishment Is Not a Casino: The following establishments are not casinos for purposes of this rule:¶¶

(a) An establishment whose annual non-Lottery sales are at least 50 percent of the establishment's total income as defined in section (5) of this rule. This subsection does not apply if the Director determines that the establishment is a convenience store or a business not normally associated with the on-premise consumption of food and alcoholic beverages as described in OAR 177-045-0030(2).¶¶

(b) A private club as described in ORS 471.175 so long as the private club is not engaged exclusively in the business of selling Lottery tickets and shares.¶¶

(5) Income Analysis: In determining whether an establishment meets the criteria set forth in subsection (4)(a) of this rule, the Director shall conduct an income analysis as set forth below.¶¶

(a) General: The Director shall conduct a review of the establishment's total income which, for the purpose of this rule, shall equal the sum of the establishment's total annual Lottery compensation and the establishment's annual non-Lottery sales. For a person applying to become a Video Lottery retailer, the Director shall conduct a review of the establishment's projected total income which, for the purposes of this rule, shall equal the sum of the establishment's projected total annual Lottery compensation and the establishment's reasonably projected annual non-Lottery sales. If the review of an establishment's total income shows that the establishment's annual non-Lottery sales are less than 50 percent of total income or projected total income, and there is no conclusive evidence that the establishment is not a casino as explained in section (4) above, the Director shall consider other factors as set forth in section (6) below in determining whether the establishment is operating or may operate as a casino. The twelve-month period selected for the review will be chosen by Lottery staff. The ratio of an establishment's total annual Lottery compensation to its total income shall be determined by dividing the establishment's total annual Lottery compensation by the sum of:¶¶

(A) The establishment's actual, or in the case of an applicant, reasonably projected annual non-Lottery sales; and¶¶

(B) The establishment's actual or projected total annual Lottery compensation.¶¶

(b) CPA Review: The retailer or applicant may request that a Certified Public Accountant (CPA), engaged and paid for by the retailer or the applicant, verify the accuracy of the Lottery's calculation of the retailer's annual non-Lottery sales or the applicant's reasonably projected annual non-Lottery sales. The CPA must use procedures specified by the Lottery and document his or her analysis as required by the Lottery. The Director may consider the CPA's analysis in making the final determination.¶¶

(c) Director's Determination: The final determination of the ratio of an establishment's actual or projected total annual Lottery compensation to the establishment's actual or projected total income shall be made by the Director.¶¶

(d) Business Records: For the purposes of this rule, a Lottery retailer must acquire, compile, retain, and make readily available to the Lottery all business sales and expense records that are pertinent to the calculation and determination of the establishment's total income for a period of 24 months. Required records of the gross non-Lottery sales must be detailed and correct including, but not limited to, records of the cost, price and amount of goods sold, bank statements, records of daily sales, and other relevant sales records. Lottery staff shall be allowed to perform examinations of these records, and make any copies necessary to complete the review. Records and accounting information must be provided, at the retailer's expense, in any form or format reasonably requested by Lottery staff. Retailers operating multiple establishments must maintain separate and complete records as specified in this subsection for each establishment they operate. In the absence of adequate records, Lottery staff will make a reasonable estimate of annual non-Lottery sales based on available records and information. In making a reasonable estimate, the Lottery will only rely on records and information that the Director concludes are credible and accurate.¶¶

(6) Factors to Consider: If the income analysis indicates that the establishment's annual non-Lottery sales are less than 50 percent of total income or projected total income, and there is no conclusive evidence that the establishment is not a casino as explained in section (4) above, the Director shall consider additional relevant factors such as those described below to make a final determination whether the establishment, taken as a whole, is operating as a casino or may operate as a casino. ~~Such factors include, but are not limited to:~~¶¶

~~(a) History: The history of the establishment's operation, or lack of history. If, for example, an establishment has a longstanding history as a neighborhood pub or a family restaurant, this factor may demonstrate that the establishment is not operating as a casino.¶¶~~

~~(b) Appearance: The appearance of the premises, as perceived by a reasonable person and determined by the~~

Director, as it relates to the type of establishment. If, for example, a reasonable person, as determined by the Director, perceives the establishment to be a place to eat, drink, socialize, and engage in a variety of activities or forms of entertainment, this factor may demonstrate that the establishment is not operating as a casino.¶¶

(c) Food Service Accommodations: The availability of menus, dining tables and chairs, tableware for the consumption of food and beverages, and other accommodations intended specifically for use by patrons for eating and drinking. For example, an ample number of tables and chairs, proportionate to the size of the area, that are set up with napkins, salt and pepper, etc., and are available to patrons for eating and drinking, combined with the availability of food and beverages, the staff and means to cook, prepare and serve food and beverages, the availability of tableware, a menu or reader board, may demonstrate that the establishment is not operating as a casino.¶¶

(d) Meals and Menus: The number and variety of meals and menu items available on a daily basis. For example, serving two meals per day, such as lunch and dinner, and a variety of entrees and side dishes for each meal, as opposed to serving only one or two items, or only a variety of sandwiches, throughout the day, may demonstrate that the establishment is not operating as a casino.¶¶

(e) Non-Lottery Products and Entertainment: The number and variety of non-Lottery products and forms of entertainment available. If, for example, an establishment offers snacks, gum, and cigarettes for sale, and has pool, darts, and live music and dancing, as opposed to only one or two products or services, this factor may demonstrate that the establishment does not operate as a casino. This factor acknowledges that a retailer's efforts to sell or serve non-Lottery products or services are not always successful. The mere fact that the non-Lottery products or services are readily available, as evidenced by observation and records, is a factor.¶¶

(f) Business Name: The name of the business. For example, if the establishment has non-Lottery entertainment options such as televisions, jukebox, pool, or darts.¶¶

(g) The establishment's assumed business name does not contain words, references, or allusions to gambling or gambling related objects or activities; good luck or good fortune, or winning, directly or indirectly, this factor may demonstrate that the establishment does not operate as a casino.¶¶

(h) Advertising: Advertising and promotional activities. If, for example, the retailer advertises.¶¶

(i) The establishment has more advertisements for food and/or other non-Lottery products, services or forms of entertainment at least equivalent to advertising for Lottery products; and, if the retailer offers promotions, such as discount coupons for food and other non-Lottery products at least equivalent to promotional activities related to Lottery products, this factor may demonstrate that the establishment does not operate as a casino.¶¶

(j) Records: The retailer's financial records. If the retailer's financial records, including expenses, show that the volume of non-Lottery products and services sold, and the number and variety of non-Lottery forms of entertainment made available to patrons is greater than indicated by the establishment's annual non-Lottery sales, then it does for Lottery products. These advertisements must be visible from the exterior. ¶¶

(k) For at least five years, the establishment has: had a Video Lottery retailer contract with the Lottery; has operated with the same or similar business model; and has maintained satisfactory compliance with this rule.¶¶

(l) Atmosphere: The general atmosphere of the establishment and the attitude and approach of the retailer. If the retailer, and the retailer's employees encourage and promote food and beverage service; if the general environment is clean and inviting to patrons for purposes of dining or engaging in entertainment activities; if the establishment's dining seats as defined in OAR 177-040-0050 contain tableware such as utensils, napkin dispensers, or condiments.¶¶

(m) More than 50 percent of the retailer and the retailer's employees are equally courteous and accommodating to non-Lottery playing patrons as they are to those playing Lottery games; and if the retailer demonstrates cooperation with the Lottery and approaches this matter with a demonstrated willingness to keep the establishment in compliance, this factor may demonstrate that the establishment does not operate as a casino.¶¶

(7) Compliance Plan:¶¶

(a) General: For purposes of selling Video Lottery tickets and shares, the Lottery Director shall determine whether a Lottery retailer is operating an establishment as a casino, or in the case of an applicant, will be operating as a casino in violation of this rule. When the Director determines that an existing Video Lottery establishment is operating as a casino pursuant to review under section (6) of this rule, the Director shall notify the retailer of the determination in writing, and set forth the reasons for the determination. The Director shall provide the retailer the opportunity to develop and implement a plan to bring the establishment into compliance with this rule within six months from the date of this written notification. The plan must be submitted within 30 days from the date the notification is issued by the Lottery. The plan shall include an analysis of the retailer's business operation to show that the retailer has made a reasonable determination of what changes need to be made and the steps the retailer intends to take to bring the establishment into compliance. A retailer may not restrict access to any Lottery game

to achieve compliance with this rule without prior written approval from the Director. The retailer's submission of the plan is for the purpose of demonstrating to the Lottery that the retailer seeks to bring the establishment into compliance. The Lottery will review the retailer's plan and may offer guidance to help the retailer bring the establishment into compliance. The retailer is solely responsible for implementing the plan and for its success or failure during the six month period.¶¶

(b) Four Month Review: At the end of the first four months of the six-month period, the Lottery will review the retailer's progress toward compliance, and may provide the retailer with factual information, analysis, or recommendations if it appears to Lottery staff that doing so will assist the retailer in bringing the establishment into compliance.¶¶

(c) Determination at End of Six-Month Period: At the end of the six-month period, the Director shall determine whether the establishment is in compliance. A retailer shall be deemed to be in compliance if either:¶¶

(A) The establishment's total Lottery compensation was not more than 50 percent % of the establishment's total income, as set forth in section (5) of this rule, over the entire six-month period; or¶¶

(B) Based upon an analysis of some or all of the factors set forth in section (6) of this rule, or other additional factors, the Director determines that the establishment is not operating as a casino.¶¶

(d) Sixth Month: If the establishment's total Lottery compensation was not more than 50 percent of the establishment's total income, as set forth in section (5) of this rule, for the sixth month of the plan (but not the entire six months), the Director may extend the original six month period of the compliance plan up to three additional months if, in the opinion of the Director, the retailer will become compliant within that time. At the end of the additional time period, the Director shall determine whether the establishment is in compliance based upon subsection (7)(c) of this rule.¶¶

(e) Termination: If, at the end of the compliance period, the Director determines that the establishment continues to operate as a casino, the retailer's contract to sell Video Lottery tickets and shares shall be immediately terminated.¶¶

(f) One Year Review: If, at the end of the compliance period, the Director determines that the establishment is no longer operating as a casino, the Director shall send a notice of compliance to the retailer. At the end of one year commencing on the first day of the month following notification of compliance, the Lottery will conduct another compliance review as set forth in this rule. If the Director determines that the establishment is again operating as a casino, the retailer's contract to sell Video Lottery tickets and shares shall be immediately terminated. The retailer shall not be given the opportunity to implement a compliance plan as described in subsections (7)(a), (b), (c), and (d) of this rule in these circumstances. Nothing in this subsection prohibits the Director from initiating another review at any time as set forth in section (3) of this rule.¶¶

(g) Application Denial: If a person applying to become a Video Lottery retailer is projected by the Lottery not to be in compliance with the requirements of this rule, the Director shall deny the application.¶¶

(8) Re-Application: Re-application after an application denial is covered under OAR 177-040-0010(8). Re-application after a contract termination is covered under OAR 177-040-0120.

Statutory/Other Authority: ~~ORS 464~~ Const, Art XV, ¶ 4(4)(a), ORS 461.120, 461.217, 461.300

Statutes/Other Implemented: ~~OR~~ Const., Art: XV, ¶ 4(4), ORS 461.215, ~~461.217~~150, 461.215, ORS 461.120, 461.217, 461.300