



Memo

Date:	December 8, 2021
To:	Oregon State Lottery Commissioners
From:	Kris Skaro, rules and policy analyst
Subject:	Rule change to allow alternative disclosure for Tribally owned applicants (OAR 177-040-0001)

Rule Change Adopted to Allow Alternative Disclosure for Tribally Owned Retailer Applicants:

Recently, Tribally owned business entities have expressed interest in contracting with the Lottery to sell Lottery products off Tribal lands. The Lottery welcomes this opportunity for partnership with Oregon Tribes.

However, in considering these applications, the scope of required disclosure under OSL rules is unclear. (For example, it's possible all members of the Tribal governing body may need to disclose.) This uncertainty around the extent of disclosure requirements has been a barrier to moving forward with the application process.

To resolve uncertainty and allow pending applications to move forward, Director Pack adopted a temporary rule change to allow Tribally owned applicants to be eligible for an alternative disclosure process. Consistent with Oregon law, the alternative disclosure process must be recommended by the Director and approved by the Commission.

Enclosures and Next Steps:

The Lottery would also like to start the permanent rulemaking process. The draft Notice of Proposed Rulemaking is enclosed for your review. I will report back to you in February after the rulemaking process is complete.

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

NOTICE OF PROPOSED RULEMAKING
CHAPTER 177
OREGON STATE LOTTERY

FILING CAPTION: *Clarifying process for waiving disclosure for Lottery retailer applicants and making Tribally owned applicants eligible*

LAST DAY AND TIME TO OFFER COMMENT TO LOTTERY: Monday, January 31, 2022, at 5 p.m.

HEARING(S):

DATE: Tuesday, January 18, 2022

TIME: 10 – 11 a.m. PST

OFFICER: Kris Skaro

ADDRESS: Zoom hearing at <https://us06web.zoom.us/j/88244082848> or join by phone by calling 1-253-215-8782 and entering meeting ID: 882 4408 2848#

SPECIAL INSTRUCTIONS:

The public may attend the hearing by using the URL or call-in information provided. If you have questions about how to attend the public rulemaking hearing, or how to submit written comment, or if you need accommodation, please contact Kris Skaro at kris.skaro@lottery.oregon.gov or 971-719-0794. Please be aware that the Lottery Commissioners and Director will not attend the hearing but will receive a summary of all comment received and must consider all comments before adopting permanent rules.

NEED FOR THE RULE(S):

The Lottery needs to amend OAR 177-040-0001 about Lottery retailer application requirements to make permanent a temporary rule adopted on December 6, 2021, that allowed the Lottery to use an alternative disclosure process for Lottery retailer applicants that are located off Tribal Land, but that are wholly owned by an Oregon Tribe.

Without the amendment, the rule does not allow these applicants to qualify for waiver of disclosure. However, when a business entity is owned by a Tribe and applies to be a Lottery retailer, the required scope of disclosure under current rule may be overly burdensome and require, for example, disclosure of members of the Tribal governing body. These disclosures may pose an unreasonable burden on the Tribe, while offering little benefit to the Lottery. This confusion around the required scope of disclosure is a barrier to what could otherwise be a mutually beneficial partnership between a Tribally owned business entity and the Lottery.

The proposed amendment to OAR 177-040-0001 would allow the director to propose an alternative disclosure process for these applicants, subject to review and approval by the Commission, as allowed by [ORS 461.300\(2\)\(b\)](#). The proposed alternative disclosure process could, for example, be limited to persons related to the business entity itself and those involved in management and the daily functions and operations of the business. If the director determined at any time that additional disclosure is required to ensure the fairness, integrity, security, and honesty of the Lottery, the director could require such additional disclosures as needed. Thus, this amendment would not jeopardize the Lottery's ability to ensure the fitness of potential Lottery retailers, and the proposed amendment is consistent with the authority and discretion granted to the director and the Commission in [ORS 461.300\(2\)\(b\)](#).

Additionally, the Lottery needs to amend OAR 177-040-0001 to clarify the timing of Commission approval. (This also makes permanent a temporary rule change adopted on December 6, 2021.) Without amendment, the rule requires the Lottery to complete the security investigation prior to obtaining Commission approval of the alternative disclosure process. The proposed amendment would require Commission approval of the proposed alternative prior to the security investigation. This ensures Commission oversight and approval from the start, and the intent is that this sequence will avoid surprises or reversals late in the retailer application, background investigation, and contracting processes.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

The Lottery prepared or relied upon the following principal documents, reports, or studies in considering the need for and in preparing the rule. They are available for public inspection as described below or upon request to Kris.skaro@lottery.oregon.gov:

- ORS chapter 461, and specifically, ORS 461.300(2)(b), available at https://www.oregonlegislature.gov/bills_laws/ors/ors461.html.
- Article XV, § 4(4) of the Oregon State Constitution, available at https://www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx.
- OAR chapter 177, available at <https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=153>.
- LOTT 19-2021, the Lottery's Temporary Administrative Order filed on December 6, 2021 to amend OAR 177-040-0001, available on the Secretary of State website or upon request to the Lottery.
- Lottery data about average Video Lottery retailer sales and revenue, available upon request to the Lottery; see also discussion in Fiscal and Economic Impact statement in this Notice of Proposed Rulemaking.
- Internal emails about current alternative disclosure process and proposed procedure for tribally owned applicants, available upon request to the Lottery.
- Internal communications/records regarding tribally owned retail contract applicants, available upon request to the Lottery.
- Letters to Tribal representatives about the proposed rule change, available upon request to the Lottery.
- Communications from Lottery about temporary rule change, available upon request to Lottery.

- Budget Report and Measure Summary for SB 5533 A (2021) available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63314>.

FISCAL AND ECONOMIC IMPACT

The purpose of amending OAR 177-040-0001 is to remove one barrier to contracting with a Lottery retailer applicant that is owned by a Tribe and who applies to sell Lottery products off Tribal Land. To the extent that the rule change results in additional retailer contracts, and those contracts generate additional Lottery revenue, then the Lottery estimates the rule change would have a positive economic or fiscal impact on the Lottery, state agencies and units of local government who typically receive Lottery revenue, and Tribally owned entities who are able to contract with the Lottery.

The Lottery is unable to provide estimates of the fiscal impact with a high degree of certainty. The Lottery does not know, for example, how many entities will apply and qualify under the rule change or, additionally, how much such a retailer will generate in future Lottery sales, as sales vary from retailer to retailer based on type of business, location, and macroeconomic factors.

In lieu of providing specific estimates, the Lottery has provided annualized sale estimates based on a recent new Video Lottery retailer to give the public a ballpark of the possible fiscal and economic impacts of the rule change on various entities. See the Lottery's cost of compliance statement below for further discussion.

COST OF COMPLIANCE:

(1) Identify any state agencies, unit of local government, and members of the public likely to be economically affected by the rule(s).

THE LOTTERY: The Lottery estimates amending OAR 177-040-0001 will have a positive fiscal impact on the Lottery only to the extent that removing one barrier to contracting with Tribally owned entities to sell Lottery products off Tribal lands will increase overall Lottery revenue. As stated in the statement of fiscal and economic impact, the Lottery does not have information available to predict how many new retailer contracts may result from the rule change. However, to give a sense of the possible range of fiscal impact, Lottery provides the following annualized estimate based on one average new Video Lottery retailer. Using this estimate, it's possible that any new contracts that are entered because of this rule change could benefit the Lottery about \$20,000 annually. (Again, the actual impact could be more or less, depending on how many applications are submitted and approved and the future sales of those new retailers.)

- Dollars Played (Gross Sales) = \$3,378,702
- Net Sales (Gross Sales Less Prizes) = \$258,346
- Retailer Commissions = \$69,252
- Transfers to the State = \$168,442
- Lottery Share (Covers Other Admin Expenses, Future Investments, Contingency Funding, etc.) = \$20,652

STATE AGENCIES OTHER THAN THE LOTTERY: The Lottery estimates amending OAR 177-040-0001 would have a positive fiscal and economic effect on other state agencies only to the extent that removing a

barrier to contracting with Tribally owned entities to sell Lottery products off Tribal lands will increase overall Lottery revenue. As noted above, the Lottery is, first, unable to estimate how many retailers will apply and be eligible for alternative disclosure and, second, the Lottery is unable to predict the future sales of those new retailers. Additionally, just because Lottery revenue changes, that doesn't necessarily mean any one state agency will benefit, as the Legislature has discretion (within constitutional constraints) to allocate Lottery revenue.

That said, many state agencies receive Lottery revenue and, thus, when Lottery revenue increases or decreases, it's possible state agencies will be economically affected. In the example Video Lottery retailer above, an estimated \$168,442 will be returned to the state annually to disperse to various constitutional and statutory beneficiaries. To see state agencies that typically receive Lottery funds, see, for example, the Budget Report and Measure Summary for SB 5533 A (2021) available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63314>, which allocates projected Lottery revenue for the 21-23 biennium to various public programs, including specific state agencies.

UNITS OF LOCAL GOVERNMENT: The Lottery estimates amending OAR 177-040-0001 would have a positive fiscal and economic effect on units of local government only to the extent that removing a barrier to contracting with Tribally owned entities to sell Lottery products off Tribal lands increases overall Lottery revenue. Various units of local government receive Lottery funds, such as local school districts (through the State School Fund) and local county governments (through a percentage of Video Lottery proceeds pursuant to [ORS 461.547](#)). Again, all the predictive limitations discussed previously continue to apply, and therefore, Lottery is not able to estimate how much any particular unit of local government may receive if the rule change results in increased Lottery revenue. To see how units of local government may benefit from Lottery revenue, see, for example, the Budget Report and Measure Summary for SB 5533 A (2021) available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63314>, which describes, for two examples, distributions of Lottery revenue to the State School Fund and to county economic development.

RETAILER APPLICANTS: To the extent that any particular retailer applicant is able to contract with the Lottery to sell Lottery products, who otherwise would not have contracted with the Lottery because of burdensome disclosure requirements, then the Lottery estimates amending OAR 177-040-0001 would have a positive economic effect on that applicant roughly equivalent to the amount of any future commissions the retailer earns for selling Lottery products. Of course, the fiscal and economic impact to any particular retailer will vary based on a number of factors, such as type of Lottery product being sold, location and size of the retailer, and macroeconomic factors. To provide a sense of the possible fiscal impact, the average Video Lottery retailer (described above) earns about \$69,000 per year in commissions.

(2) Effect on Small Businesses:

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

NUMBER SUBJECT TO THE RULE: OAR 177-040-0001 in its entirety describes all the requirements to apply for a Lottery retailer contract. Therefore, any business, including a small business, is subject to the rule if the business applies for a Lottery retailer contract. In an average year, the Lottery receives about 1,500 applications for a Lottery retailer contract, and they are all subject to requirements of the rule.

The Lottery does not have information available to estimate the number of applicants that meet the definition of a small business in [ORS 183.310](#), but in Lottery's experience, most do.

No small businesses are subject to the alternative disclosure process in section (4) as currently written. As currently written, only large public companies and multi-state retail chains are eligible for alternative disclosure. Those businesses are, by definition, not small businesses for purposes of [ORS 183.310](#).

As to the number of small businesses that are subject to the amendment described in this notice, the Lottery estimates that some of the businesses who will be eligible for the alternative disclosure process under the proposed amendment will be small businesses, but the Lottery does not have enough information to estimate how many exist, are interested in applying for a retailer contract, and whether those businesses would meet the definition of a small business in [ORS 183.310](#). At this time, the Lottery is aware of three businesses that are Tribally owned that may be interested in applying to sell Lottery products, and it's possible those are small businesses, but it depends on the legal structure of the business entity, whether the business is independently owned and operated, and the number of employees.

TYPE SUBJECT TO THE RULE: OAR 177-040-0001 in its entirety applies to any business that applies for a Lottery retailer contract. In practice, the types of businesses that apply to contract with the Lottery include convenience stores, grocery stores, gas stations, bars, taverns, restaurants, fraternal organizations, bowling alleys, cafes/small eateries, and adult entertainment establishments.

As to the specific section of the rule that describes applicants that may be eligible for alternative disclosure, the rule is currently limited to large public companies and multi-state retail chains, which are, by definition, not small businesses for purposes of [ORS 183.310](#). In practice, the type of businesses that have used alternative disclosure are large multi-chain grocery and convenience stores.

As for the retailer applicants that may apply after the rule change takes effect, the type of business is likely to be the type that typically apply for Lottery retailer contracts, such as convenience stores, grocery stores, gas stations, bars, taverns, restaurants, bowling alleys, or cafe/small eateries.

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

The Lottery expects no new reporting, recordkeeping, or administrative activities or costs required to comply with OAR 177-040-0001 beyond what is already required of retailer applicants. The proposed amendment is intended to reduce administrative costs and burdens by creating a path for limited disclosure requirements.

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

The Lottery estimates no new costs of professional services, equipment, supplies, labor, or increased administration to comply with OAR 177-040-0001 beyond what is already required of retailer applicants. The proposed amendment is intended to reduce administrative costs and burdens for those applicants who qualify for alternative disclosure.

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

The Lottery did not involve small businesses in the development of these rules but invites comment from small businesses during the public rulemaking process. The Lottery determined the proposed rule change will have the most impact on Lottery retailer applicants that are wholly owned by an Oregon Tribe. Therefore, the Lottery shared the proposed rule change with each of Oregon's nine federally recognized Tribes. It's possible some of the Tribally owned business entities that apply for a retailer contract in the future will meet the definition of a small business in [ORS 183.310](#).

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

No. The Lottery determined that Oregon's federally recognized Tribes may be affected by and interested in the proposed rule change. The Lottery contacted each of Oregon's nine federally recognized Tribes to notify them regarding the Lottery's intended rule change and to request feedback or other engagement and consultation from any Tribe that is interested or affected by the rule change. The Lottery will continue Tribal consultation throughout the rulemaking process and will meaningfully consider any feedback from Tribes about the rule. The Lottery also welcomes other public comment and will consider all comment received.

CONTACT:

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RULES PROPOSED:

AMEND: OAR 177-040-0001

RULE TITLE: General Application Requirements

RULE SUMMARY:

The Lottery is proposing to amend OAR 177-040-0001 about retailer application requirements to make permanent temporary changes adopted on December 6, 2021. As amended, the rule would allow applicants that are Tribally owned to qualify for alternative disclosure as described in [ORS 461.300\(2\)\(b\)](#). The Lottery requests comment on whether the proposed language captures the Tribally involved business entities that may apply to sell Lottery products off Tribal lands. The Lottery may amend the language in response to information received during the rulemaking process.

Additionally, the Lottery is proposing to amend OAR 177-040-0001 to change the sequence of events in the alternative disclosure process. (This change was adopted by temporary rule on December 6, 2021.) Specifically, under the proposed rule changes, the Director's recommendation and the Commission's approval or denial occur prior to the start of the disclosure and background investigation process. As

currently written, the alternative disclosure process and background investigation are completed prior to obtaining Commission approval, which creates a risk of reversals or surprises late in the contract application, disclosure, and background investigation processes. Again, the Lottery requests public comment on this proposed change, and may amend the language in response to information received during the rulemaking process.

Lastly, the Lottery proposed to update statutory authority and statutes implemented. The Lottery may make additional non-substantive updates to the rule during the rulemaking process to ensure improve the rule's clarity, accuracy, organization, and readability.

177-040-0001

General Application Requirements

- (1) General: Any person may request an application from the Lottery.
- (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) Large Public Companies or Multi-State Retail Chains: If an applicant for a traditional lottery game retailer contract is 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:~~

~~(A*i*) 30 or more individual retail locations; and~~

~~(B*ii*) Gross annual revenues of \$10 million or more; and~~

~~(C*iii*) 300 or more employees;~~

~~then the Lottery may use an alternative disclosure process that has been approved by the Lottery Commission as authorized under ORS 461.300(2)(b). This alternative disclosure process will focus its disclosure requirements on the public company or the multi-state chain itself. 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) An entity wholly owned by a federally recognized Tribe.~~

~~(b) The alternative disclosure process recommended by the Director must be approved by the Commission. After the Lottery's Security Section has completed its investigation of an applicant under the alternative disclosure process, the Director may request that the Commission waive the personal disclosure requirements for an applicant that successfully passes the alternative disclosure process.~~

~~(A) If approved: If by the Commission, the Director may continue the retailer application process approves the waiver. 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. the Director may then enter into a contract with the applicant.~~

~~(B) If Denial: If denied by the Commission, does not approve the waiver/alternative disclosure process, the applicant must provide the personal disclosure otherwise required under the Lottery's governing statutes and rules, and if the Director concludes based on that disclosure that the applicant is not a potential threat to the fairness, integrity, security, and honesty of the Lottery, the Director may then enter into a contract with the applicant.~~

(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, & Sec. § 4\(4\)\(a\), ORS 461.120, 461.130, 461.150, 461.190, 461.217, 461.300](#)

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