



# Memo

<b>Date:</b>	July 14, 2022
<b>To:</b>	Oregon State Lottery Commissioners
<b>From:</b>	Kris Skaro, rules and policy analyst
<b>Subject:</b>	Motion to Adopt OAR 177-040-0052, Non-Sufficient Funds

## **Background:**

In May, Lottery proposed a rule change to require documentation that a bank error caused an NSF to be submitted within five business days. This change is intended to help Lottery resolve retailer NSF's quickly, which provides clarity for the Lottery and the retailer in the event a subsequent NSF occurs.

## **Rulemaking Process:**

The Lottery has completed the rulemaking process, which is documented in full for the public and the Commission in the enclosed Rulemaking Report.

## **Public Comment/Rule Updates:**

The Lottery provided more than four weeks for the public to submit written comment and held a virtual public rulemaking hearing to take comment via Zoom. The Lottery also notified all Lottery retailers of the proposed rule change by email.

The Lottery received one written comment. To summarize, the comment recommended allowing 20-30 days to provide documentation and specifying what documentation is required in rule or, alternatively, do not require any documentation. The commenter said these changes are needed because retailers are short-staffed due to high labor costs and difficulty hiring.

The Lottery has considered the comment and recommends increasing the time allowed to seven working days (instead of five). This ensures NSF's can be resolved quickly while also ensuring a retailer has at least one full work week to submit documentation. Additionally, Lottery personnel who speak to retailers after an NSF occurs will explain what documentation is required (typically a simple statement from the bank describing the error) and, for those retailers who are unable to meet the timeline, explain that the rule allows retailers to request an exception.

## **Enclosures and Director's Recommendation:**

The final rulemaking report and the draft Permanent Administrative Order are enclosed. Director Pack has reviewed the enclosed materials, and considered all comment received, and recommends the Commission amend OAR 177-040-0052 as presented here to be effective August 1, 2022.

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

## Rulemaking Report

### Notice of Proposed Rulemaking

The Lottery filed a Notice of Proposed Rulemaking with the Secretary of State on May 26, 2022, indicating that the Lottery proposed to amend OAR 177-040-0052 to require a retailer to provide documentation that a bank error caused the retailer's electronic funds transfer (EFT) to be returned for non-sufficient funds (NSF) within five working days from the date the NSF occurred:

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

### Rulemaking Timeline

- **5/20/22** Rulemaking listed on Commission agenda; rules and notice presented.
- **5/26/22** Filed notice with Secretary of State.
- **5/27/22**
  - Notice sent to Lottery's Interested Parties (email and postal mail).
  - Notice sent to legislators per ORS 183.335(15).
  - Notice sent to media outlets at the Capitol Press Room.
  - Notice posted on Lottery's website.
- **6/1/22** Notice published in Secretary of State Bulletin .
- **6/10/22** Email sent to Lottery retailers explaining proposed rule change.
- **6/30/22** End of written comment period at 5 p.m.
- **7/22/22** Rules listed on Commission agenda; request Commission approval to adopt rules as presented.
- **8/1/22** Permanent rules effective *PENDING Commission approval*.

### Public Comment Opportunities and Summary

The Notice opened a four-week written comment period until June 30, 2022, at 5 p.m. The Notice also announced a public rulemaking hearing to be held via Zoom on June 15, 2022. The Lottery also notified all Lottery retailers about the proposed change to the NSF process via email on June 10, 2022.

**The Lottery received one written comment.** To summarize, the comment recommended allowing 20-30 days to provide documentation in light of staffing shortages and high labor costs retailers face. The comment also recommended detailing what documentation is required in the rule or, alternatively, not requiring any documentation at all.

The Lottery considered the comment and recommends extending the deadline from five working days to seven working days to ensure retailers will have at least one full workweek to obtain documentation. Additionally, Lottery personnel who communicate with retailers after an NSF occurs will (1) explain (consistent with current practice) what is required to demonstrate that a bank error occurred (generally, a brief statement describing the error provided by personnel of the financial institution) and, (2) for any retailer who reports they need more time to obtain documentation, explain that OAR 177-040-0052 allows the retailer to request an exception.

### Director's Recommendation and Commission Motion

Director Pack has reviewed the proposed rule and considered all comment received, and recommends the Commission adopt the rule as presented in the enclosed Permanent Administrative Order to be effective on August 1, 2022.

**PERMANENT ADMINISTRATIVE ORDER**

CHAPTER 177  
OREGON STATE LOTTERY

FILING CAPTION: *Establishing timeline for Lottery retailer to provide documentation that bank error caused nonsufficient funds*

EFFECTIVE DATE: 08/01/2022

AGENCY APPROVED DATE: PENDING Commission approval

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AMEND: 177-040-0052

RULE TITLE: Non-Sufficient Funds

RULE SUMMARY: OAR 177-040-0052 explains the consequences for when a Lottery retailer's electronic funds transfer (EFT) payment to the Lottery is not completed due to non-sufficient funds (NSF) in the retailer's EFT account. Specifically, the rule distinguishes between a retailer's first and second NSF and, additionally, explains that if an NSF occurs because of a bank error, the NSF will not be treated as an NSF under the rule so long as the error is corrected, and Lottery receives documentation from the financial institution indicating that the NSF occurred due to a bank error.

In the Notice of Proposed Rulemaking filed on May 26, 2022, the Lottery proposed to amend OAR 177-040-0052 to add a timeframe by which a retailer must submit documentation of a bank error. This ensures the Lottery and the retailer know if an NSF will be treated as a bank error or a first NSF, which is important if a subsequent NSF occurs. The Lottery proposed a deadline of five working days in the draft rule text provided with the rulemaking notice.

After considering comment and other information received during the rulemaking process, the Lottery is amending OAR 17-040-0052 to state that documentation of a bank error must be provided within seven working days of the NSF. The Lottery made other non-substantive updates to the rule, including correcting spelling and grammar and updating the statutory authority and statutes implemented section of the rule.

RULE TEXT:

[177-040-0052](#)

**Non-Sufficient Funds**

*(Amended 8/31/18)*

- (1) Definitions: For purposes of this rule:
  - (a) “Working day” means a weekday (Monday through Friday) from 8 a.m. to 5 p.m. when Lottery Headquarters is open for business.
  - (b) “NSF” means non-sufficient funds.
- (2) Retailers with Temporary Contract or Letter of Authority: If an electronic funds transfer (EFT) from a retailer with a temporary contract or a letter of authority issued under [ORS 461.335](#) is not completed due to NSF in the retailer’s EFT account, and non-payment is not excused under this rule, the Lottery shall terminate the retailer’s temporary contract or letter of authority, and disable or remove Lottery equipment from the retailer’s premises. Processing of the retailer’s application for a retailer contract otherwise may proceed.
- (3) First NSF: The first time that a Lottery retailer’s EFT payment to the Lottery is not completed due to NSF in the retailer’s EFT account, the Lottery shall:
  - (a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;
  - (b) Disable Equipment: Disable the Lottery’s equipment on the retailer’s premises for up to five working days, in which time the retailer must pay, by certified funds, the EFT transfer amount plus an additional \$50 fee for the Lottery’s administrative expenses in processing the NSF;
  - (c) Withhold Bonus: Withhold any bonus and incentive payments the retailer may have earned for the business week in which the NSF occurs. If the retailer does not make the required payments within five working days of the date the equipment was disabled, the retailer shall forfeit the bonus and incentive payments; and
  - (d) Terminate Contract: Terminate the retailer’s contract and remove the Lottery’s equipment if the retailer fails to pay, by certified funds, the EFT transfer amount plus the \$50 fee within five working days of the date the equipment was disabled.
- (4) Second NSF: When a retailer’s EFT payment is not completed to the Lottery due to NSF in the retailer’s EFT account for a second time within 12 months of the retailer’s first NSF, the Lottery shall:
  - (a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;
  - (b) Disable Equipment: Disable the Lottery’s equipment on the retailer’s premises for up to five working days, in which time the retailer must pay, by certified funds, the EFT

transfer amount plus an additional \$50 fee for the Lottery's administrative expenses in processing the NSF and post a bond or make a cash deposit;

- (c) Withhold Bonus: Withhold any bonus and incentive payments the retailer may have earned for the business week in which the NSF occurs. If the retailer does not make the required payments within five working days of the date the equipment was disabled, the retailer shall forfeit the bonus and incentive payments; and
  - (d) Bond/Cash Deposit: The Lottery shall require the retailer to post:
    - (A) Cash: A cash deposit by certified funds; or
    - (B) Bond: A bond issued by a surety company or companies holding a certificate of authority to transact surety business in the State of Oregon and approved by the Director. The Director shall determine the amount, the term, and any other applicable conditions of the bond.
    - (C) The amount of the bond or cash deposit will be no less than twice the retailer's weekly average EFT transfers, calculated using the immediately preceding three calendar months.
    - (D) The bond must remain in effect until the Lottery determines that it is no longer necessary. The Lottery will hold the cash deposit until the Lottery determines that it is no longer necessary.
  - (e) If the retailer fails to pay, by certified funds, the EFT transfer amount plus the \$50 fee within five working days of the date the equipment was disabled, or fails to post a bond or make a cash deposit within five working days of the date the equipment was disabled the retailer contract shall be terminated.
- (5) Subsequent NSF: When a Lottery retailer's EFT payment is not completed to the Lottery due to NSF in the retailer's EFT account more than twice within 12 months of the retailer's first NSF, the Lottery shall:
- (a) Notify the Retailer: Make a reasonable effort to notify the Lottery retailer of the NSF;
  - (b) Disable Equipment: Disable the Lottery's equipment on the retailer's premises for up to five working days, in which time the retailer must pay, by certified funds, the EFT transfer amount plus an additional \$50 fee for the Lottery's administrative expenses processing the NSF;
  - (c) Forfeit Bonus: Require the retailer to forfeit any bonus and incentive payments the retailer may have earned for the business week in which the NSF occurs; and
  - (d) Terminate Contract: Terminate the retailer's lottery contract and remove the Lottery's equipment if the retailer fails to pay, by certified funds, the EFT transfer amount plus the \$50 fee within five working days of the date the equipment was disabled.

- (6) NSF Due to Financial Institution Error: Any NSF that is due to an error committed by the retailer's financial institution will not be treated as an NSF under this rule as long as the error is corrected and Lottery receives documentation within seven working days from the NSF from the retailer's financial institution. The financial institution must substantiate to the Director's satisfaction the financial institution's responsibility for causing the NSF, and that but for the financial institution's error, sufficient funds would have been available in the retailer's account to cover the EFT payment.
- (7) Financial Institution Closures: Any NSF that is due to an unexpected temporary closure of the retailer's financial institution will not be treated as an NSF under this rule as long as the NSF is corrected and Lottery receives documentation within seven working days from the NSF from the retailer's financial institution that substantiates to the Director's satisfaction the reason for the financial institution's unexpected closure. The retailer shall make the deposit before 5 p.m. of the next day the financial institution is open or available for deposits to be made. If the deposit is not made as described, the Lottery shall treat it as an NSF under these rules.
- (8) Retailer's Obligations Survive Contract Termination: Termination of the retailer's contract does not release the retailer from any obligation to pay all amounts due the Lottery under this rule and the retailer's Lottery contract. The Lottery may make a claim upon any bond, or cash deposit posted under this rule, and apply the money to any of the retailer's obligations owed to the Lottery. The Lottery may initiate collection action on behalf of the State to collect all amounts due.
- (9) Director's Discretion: The Director may make exceptions to these requirements based upon the facts and circumstances of any particular payment by a retailer which is rejected for NSF.

Statutory/Other Authority: ~~ORS 461 & ORr Const., Art. XV & Sec. § 4(4)(a), ORS 461.120, 461.130, 461.150, 461.300~~

Statutes/Other Implemented: ~~Or Const, Art XV, § 4(4), ORS 461.120, 461.130, 461.150, 461.300~~