



INTEROFFICE MEMO

Gary Grief, Executive Director

Alfonso D. Royal III, Charitable Bingo Operations Director

To: J. Winston Krause, Chairman
Carmen Arrieta-Candelaria, Commissioner
Peggy A. Heeg, Commissioner
Doug Lowe, Commissioner
Robert Rivera, Commissioner

From: Ryan S. Mindell, Assistant General Counsel

Date: October 5, 2017

Re: Consideration of and possible discussion and/or action, including adoption, on amendments to 16 TAC §401.153 (Qualifications for License)

Attached is a draft rule prepared for submission to the *Texas Register* to adopt amendments to 16 TAC §401.153 (Qualifications for License), without changes to the proposed text as published in the August 25, 2017, issue of the *Texas Register* (42 TexReg 4217) (also attached). The purpose of the amendments is to add language required by newly-enacted HB 1555 concerning certain locations licensed to sell alcoholic beverages. Specifically, the statute permits the Commission to license these locations if they derive less than 30 percent of their gross receipts from the sale or service of alcoholic beverages.

The Commission received no written comments on the proposed amendments during the public comment period.

Recommendation: Staff recommends the Commission adopt the attached rule amendments to 16 TAC §401.153 (Qualifications for License).

1 The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.153
2 (Qualifications for License), without changes to the proposed text as published in the August 25,
3 2017, issue of the *Texas Register* (42 TexReg 4217). The purpose of the amendments is to add
4 language required by newly-enacted HB 1555 concerning certain locations licensed to sell
5 alcoholic beverages. Specifically, the statute permits the Commission to license these locations if
6 they derive less than 30 percent of their gross receipts from the sale or service of alcoholic
7 beverages.

8 The Commission received no written comments on the proposed amendments during the
9 public comment period.

10 These amendments are adopted under Texas Government Code §466.015, which
11 authorizes the Commission to adopt rules governing the operation of the lottery; and Texas
12 Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement
13 and administration of the laws under the Commission's jurisdiction.

14 This adoption is intended to implement Texas Government Code, Chapter 466.
15 §401.153. Qualifications for License.

16 (a) Before issuing a license to any person under this subchapter, the director shall consider:

17 (1) the financial responsibility and security of the applicant and the business or activity in
18 which the applicant is engaged. Consideration of this factor may include the analysis of the
19 applicant's credit record, compliance with tax laws of other jurisdictions, status of permits and
20 licenses, results of criminal background check, adequacy of security procedures against theft,
21 whether the location is fixed and permanent, whether the applicant can provide appropriate
22 security, and any other factor that may assist the director in such evaluation;

1 (2) the public accessibility of the applicant's place of business or activity. Consideration of
2 this factor may include analysis of the applicant's hours of operation, proximity to major transit
3 routes, proximity to large employers, public parking availability, and any other factor that may
4 assist the director in such evaluation;

5 (3) the sufficiency of existing sales agents to serve the public convenience. Consideration
6 of this factor may include analysis of number and proximity of other sales agents in a given market
7 area, and/or number of "minority businesses" (as that term is defined in the Government Code,
8 §466.107(b)) licensed in a given market area, with the possibility that additional licenses for any
9 given market area may be denied if the area is determined to be adequately served by existing
10 licensees;

11 (4) whether individuals under 18 years of age constitute a majority of the applicant's
12 customers or as customers provide a majority of the applicant's sales volume;

13 (5) the volume of expected lottery sales at the applicant's place of business or activity; and

14 (6) any other factor that is helpful in determining whether the applicant's experience,
15 character, and general fitness are such that the applicant's participation as a sales agent will not
16 detract from the integrity, security, honesty, or fairness of the operation of the lottery. An example
17 of the type of factor considered in this regard is the analysis of the type of product sold or form of
18 service provided by the applicant.

19 (b) The director may grant or deny an application for a license under this subchapter based on any
20 one or more factors listed in subsection (a) of this section. In addition, the director shall deny an
21 application for a license under this subchapter upon a finding that the applicant:

1 (1) has been convicted of a felony, criminal fraud, gambling or a gambling-related offense,
2 or a misdemeanor involving moral turpitude, if less than 10 years has elapsed since the termination
3 of the sentence, parole, mandatory supervision, or probation served for the offense;

4 (2) is or has been a professional gambler. A "professional gambler" is a person whose
5 profession is, or whose major source of income derives from, playing games of chance for profit;

6 (3) has been finally determined to be:

7 (A) delinquent in the payment of a tax or other money collected by the comptroller,
8 the Texas Workforce Commission, or the Texas Alcoholic Beverage Commission;

9 (B) in default on a loan made under Chapter 52, Education Code;

10 (C) in default on a loan guaranteed under Chapter 57, Education Code; or

11 (D) any reasons listed in Chapter 232, Family Code as cause for license suspension;

12 (4) has a spouse, child, brother, sister or parent residing as a member of the same household
13 in the principal place of residence of a person described in paragraph (1), (2), or (3) of this
14 subsection;

15 (5) has violated the Act or a rule adopted by the commission in furtherance of the State
16 Lottery Act;

17 (6) is not an individual, and an individual described in one or more of paragraphs (1) - (5)
18 of this subsection:

19 (A) is an officer or director of the applicant;

20 (B) holds more than 10% of any class of issued and outstanding stock in the
21 applicant;

22 (C) holds an equitable ownership interest greater than 10% in the applicant;

1 (D) is a creditor of the applicant to the extent of more than 10% of the applicant's
2 outstanding debt at any time after the application is filed but before the director acts to grant or
3 deny the license;

4 (E) is the owner or lessee of a business that the applicant conducts or through which
5 the applicant will conduct a ticket sales agency;

6 (F) shares or will share in the profits, other than stock dividends, of the applicant
7 or sales agent;

8 (G) participates in managing the affairs of the applicant; or

9 (H) is an employee of the applicant who is or will be involved in selling tickets or
10 handling money from the sale of tickets;

11 (7) provided false or misleading information on the application form, or failed to provide
12 information required as part of the application;

13 (8) failed to provide fingerprint identification for individuals for which such identification
14 is requested in a form acceptable to the division following the division's request for such
15 identification;

16 (9) has previously had a sales agent's license revoked, unless the director is satisfied the
17 person will comply with the State Lottery Act and the rules under this chapter; or

18 (10) failed to certify to the director the applicant's compliance with the federal Americans
19 With Disabilities Act.

20 (c) Without limiting the foregoing grounds for denial of a license under this subchapter, the director
21 shall deny a license to any person whose location for the sales agency is either:

22 (1) a location licensed for games of bingo under the Bingo Enabling Act (Occupations
23 Code, Chapter 2001);

1 (2) on land owned by the State of Texas; or a political subdivision of this state and on
2 which is located a public primary or secondary school, an institution of higher education, or an
3 agency of the state; or

4 (3) a location for which a person holds a wine and beer retailer's permit, mixed beverage
5 permit, mixed beverage late hours permit, private club registration permit, or private club late
6 hours permit issued under the Alcoholic Beverage Code, Chapter 25, 28, 29, 32, or 33, other than
7 a location for which a person holds a wine and beer retailer's permit issued under Chapter 25,
8 Alcoholic Beverage Code, that derives less than 30 percent of the location's gross receipts from
9 the sale or service of alcoholic beverages.

10 (d) Any applicant whose application is denied under this subchapter, or who is granted a license
11 the terms of which are more restricted than those applied for, shall be notified by the director in
12 writing of the denial or restriction and of the reasons therefore. The applicant may appeal the
13 director's decision in accordance with rules adopted by the commission for that purpose.

14 (e) A license issued under this chapter may by its terms limit the type of games and/or method of
15 sales authorized by the license. A determination of appropriate limitations on any license are within
16 the director's sole discretion, provided that the director shall furnish the licensee with a written
17 explanation or the reasons for any such limitations.

used for Health and Human Services administrative activities, including compliance monitoring, technical assistance, and to establish and maintain an audit reserve fund.

(2) If a provider's interim payments exceed 99 percent of the provider's federal portion of the total certified Medicaid allowable costs, HHSC recoups the overpayment using one of these two methods:

(A) HHSC offsets all future claims payments from the provider until the amount is recovered; or

(B) the provider returns an amount equal to the amount owed.

(3) If 99 percent of the provider's federal portion of the total certified Medicaid allowable costs exceeds the interim Medicaid payments, HHSC pays the difference to the provider in accordance with the final actual certification agreement.

(4) HHSC issues a notice of settlement within 24 months of the end of the reporting period.

[(1) If a provider's interim payments exceed the provider's federal portion of the total certified Medicaid allowable costs, HHSC will recoup the federal share of the overpayment using one of these two methods:]

[(A) HHSC offsets all future claims payments from the provider until the amount of the federal share of the overpayment is recovered; or]

[(B) The provider returns an amount equal to the overpayment.]

[(2) If the provider's federal portion of the total certified Medicaid allowable costs exceeds the interim Medicaid payments, HHSC will pay the federal share of the difference to the provider in accordance with the final actual certification agreement.]

[(3) HHSC will issue a notice of settlement within 24 months of the end of the reporting period.]

(g) - (h) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2017.
TRD-201703047
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: September 24, 2017
For further information, please call: (512) 707-6071

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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT
SUBCHAPTER B. LICENSING OF SALES AGENTS

16 TAC §401.153

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.153 (Qualifications for License). The purpose of the proposed amendments is to add language required by newly-enacted HB 1555 concerning certain locations licensed to sell alcoholic beverages. Specifically, the statute permits the Commission to license these locations if they derive less than 30 percent of their gross receipts from the sale or service of alcoholic beverages.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an adverse economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of Lottery Operations, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit is reflecting the statutory change which allows the licensing of certain locations permitted to sell alcoholic beverages.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Ryan Mindell, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in the *Texas Register* in order to be considered.

These amendments are proposed under Texas Government Code §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery and §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.153. Qualifications for License.

(a) - (b) (No change.)

(c) Without limiting the foregoing grounds for denial of a license under this subchapter, the director shall deny a license to any person whose location for the sales agency is either:

(1) a location licensed for games of bingo under the Bingo Enabling Act (Occupations Code, Chapter 2001);

(2) on land owned by the State of Texas; or a political subdivision of this state and on which is located a public primary or secondary school, an institution of higher education, or an agency of the state; or

(3) a location for which a person holds a wine and beer retailer's permit, mixed beverage permit, mixed beverage late hours permit, private club registration permit, or private club late hours permit issued under the Alcoholic Beverage Code, Chapter 25, 28, 29, 32, or 33, other than a location for which a person holds a wine and beer retailer's permit issued under Chapter 25, Alcoholic Beverage Code, that

derives less than 30 percent of the location's gross receipts from the sale or service of alcoholic beverages.

(d) - (c) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2017.

TRD-201703036

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: September 24, 2017

For further information, please call: (512) 344-5012

SUBCHAPTER C. PRACTICE AND PROCEDURE

16 TAC §401.207

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.207 (Written Answer; Default Proceedings). The purpose of the proposed new rule is to set forth in a rule the Commission's process for handling default contested case proceedings. In addition to describing the Commission's recently developed default process, the proposed rule requires a respondent or applicant file a written response to the Commission's notice of hearing with the State Office of Administrative Hearings (SOAH) at least 10 calendar days prior to the date of the hearing (or at least 5 calendar days prior to the date of the hearing in lottery summary suspension cases) if the respondent/applicant intends to appear at the hearing and contest the allegations in the notice of hearing. If no response is filed, or if the respondent/applicant does not appear at the hearing, SOAH and the Commission staff may proceed to dispose of the case by default. If an applicant or respondent appears at a hearing without first filing a written response, the rule contemplates that Commission staff generally would request a continuance of the hearing in order to prepare for a fully litigated contested case.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an adverse economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Bob Biard, General Counsel, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated is a more efficient use of state resources by preparing for a fully litigated contested case hearing only in instances where a respondent or applicant intends to appear at the hearing and contest the allegations in the notice of hearing.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed new

rule may be submitted to Stephen White, Assistant General Counsel, by mail, at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in the *Texas Register* in order to be considered.

The new rule is proposed pursuant to Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction, §466.015(a), which authorizes the Commission to adopt rules necessary to administer Chapter 466, and §2001.004(1) of the Texas Government Code, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§401.207. Written Answer; Default Proceedings.

(a) The Commission may dispose of a contested case by default if a State Office of Administrative Hearings (SOAH) administrative law judge (ALJ) remands the case to the Commission for informal disposition upon proof that adequate and sufficient notice of hearing was mailed to, or personally served on, the respondent or applicant, and the respondent or applicant failed to either:

(1) file a written response to a notice of hearing in accordance with subsection (d) of this section; or

(2) appear in person or through an authorized representative on the day and at the time set for the hearing of the case, regardless of whether a written response has been filed.

(b) In addition to providing service of notice of hearing by mail or personal service, the Commission shall send a copy of a notice of hearing to a respondent or applicant by email if the respondent or applicant has provided the Commission with their email address.

(c) The Commission's default order shall state that the matters set forth in the notice of hearing are deemed admitted as true, and may grant the relief requested in the notice.

(d) A respondent or applicant must file a written answer to a Commission notice of hearing with SOAH at least 10 calendar days prior to the date of the hearing set forth in the notice (or at least 5 calendar days prior to the date of the hearing in lottery summary suspension cases conducted pursuant to Texas Government Code §466.160), and must provide the Commission with a copy of the answer provided to SOAH. A general denial of matters pleaded by the Commission in the notice shall be sufficient to comply with this subsection.

(e) If a respondent or applicant fails to file a written answer to a notice of hearing as required by this section, but appears in person or through an authorized representative on the day and at the time set for the hearing of the case, good cause exists for the ALJ to grant a continuance to schedule an evidentiary hearing at the request of the Commission.

(f) Following the Commission's issuance of a default order, and upon the timely filing of a motion for rehearing by the respondent or applicant in the contested case, the Commission, for good cause shown, may grant rehearing and request that SOAH schedule an evidentiary hearing in the case.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2017.

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