



INTEROFFICE MEMO

Gary Grief, Executive Director

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

From: Stephen White, Assistant General Counsel

Date: October 5, 2017

Re: Consideration of and possible discussion and/or action, including adoption, on new §401.207 (Written Answer; Default Proceedings)

Attached is a draft rule prepared for submission to the *Texas Register* to adopt new 16 TAC §401.207 (Written Answer; Default Proceedings), with changes to the proposed text as published in the August 25, 2017, issue of the *Texas Register* (42 TexReg 4218) (also attached). The purpose of the new rule is to set forth the Commission's process for handling default contested case proceedings. In addition to describing the Commission's recently developed default process, the new rule requires a respondent or applicant file a written answer 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 3 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. (Note: the proposed version of this rule required the respondent in a lottery summary suspension hearing to file an answer at least 5 calendar days prior to the date of the hearing; however, upon further consideration, the staff believes 3 calendar days is more reasonable in view of the short time period between the date the notice of hearing is issued and the hearing date in those cases.) If no answer 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 answer, the rule contemplates that Commission staff generally would request a continuance of the hearing in order to prepare for a fully litigated contested case.

Several other non-substantive changes were made to the proposal.

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

Recommendation: Staff recommends the Commission adopt the attached new 16 TAC §401.207 (Written Answer; Default Proceedings).

1 The Texas Lottery Commission (Commission) adopts new 16 TAC §401.207 (Written
2 Answer; Default Proceedings) with changes to the proposed text as published in the August 25,
3 2017, issue of the *Texas Register* (42 TexReg 4218). The purpose of the new rule is to set forth
4 the Commission’s process for handling default contested case proceedings. In addition to
5 describing the Commission’s recently developed default process, the new rule requires a
6 respondent or applicant file a written answer to the Commission’s notice of hearing with the State
7 Office of Administrative Hearings (SOAH) at least 10 calendar days prior to the date of the hearing
8 (or at least 3 calendar days prior to the date of the hearing in lottery summary suspension cases) if
9 the respondent/applicant intends to appear at the hearing and contest the allegations in the notice
10 of hearing. The proposed rule required the respondent in a lottery summary suspension case to
11 file an answer at least 5 calendar days prior to the date of the hearing; however, upon further
12 consideration, the Commission believes 3 calendar days is more reasonable in view of the short
13 time period between the date the notice of hearing is issued and the hearing date in those cases. If
14 no answer is filed, or if the respondent/applicant does not appear at the hearing, SOAH and the
15 Commission staff may proceed to dispose of the case by default. If an applicant or respondent
16 appears at a hearing without first filing a written answer, the rule contemplates that Commission
17 staff generally would request a continuance of the hearing in order to prepare for a fully litigated
18 contested case.

19 Several other non-substantive changes were made to the proposal.

20 The Commission received no written comments on the proposed new rule during the public
21 comment period.

22 The new rule is proposed pursuant to Texas Government Code §467.102, which authorizes
23 the Commission to adopt rules for the enforcement and administration of the laws under the

1 Commission's jurisdiction; Texas Government Code §466.015(a), which authorizes the
2 Commission to adopt rules necessary to administer Chapter 466; and Texas Government Code
3 §2001.004(1), which requires state agencies to adopt rules of practice stating the nature and
4 requirements of all available formal and informal procedures.

5 This adoption is intended to implement Texas Government Code, Chapter 466.
6 §401.207. Written Answer; Default Proceedings.

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

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

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

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

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

20 (d) A respondent or applicant must file a written answer to the allegations in a Commission notice
21 of hearing with SOAH at least 10 calendar days prior to the date of the hearing set forth in the
22 notice (or at least 3 calendar days prior to the date of the hearing in lottery summary suspension
23 cases conducted pursuant to Texas Government Code §466.160), and must provide the

1 Commission a copy of the answer provided to SOAH. A general denial of matters pleaded by the
2 Commission in the notice shall be sufficient to comply with this subsection.

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

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

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

(d) - (e) (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.

TRD-201703038

Bob Biard
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: September 24, 2017
For further information, please call: (512) 344-5012

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SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.323

The Texas Lottery Commission ("Commission") proposes the repeal of 16 TAC §401.323 ("MONOPOLY MILLIONAIRES' CLUB™" Game Rule). The purpose of the proposed repeal is to remove references to a discontinued multi-jurisdiction lottery draw game no longer offered by the Commission.

Kathy Pyka, Controller, has determined that for each year of the first five years the repeal will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed repeal. 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 repeal, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the repeal 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 repeal will be in effect, the public benefit anticipated is the elimination of references to a discontinued game as well as the minimization of player confusion.

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

This repeal is proposed under Texas Government Code §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery, §466.451, which authorizes the Commission to adopt rules relating to a multi-jurisdiction lottery game, 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.

§401.323. "MONOPOLY MILLIONAIRES' CLUB™" Game Rule.

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-201703037

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16 TAC §401.324

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.324 (Prize Winner Election to Remain Anonymous). The purpose of the new rule is to implement recent legislative changes made by House Bill 59, relating to certain lottery prize winners' choice to remain anonymous. House Bill 59 establishes Texas Government Code §466.411, effective September 1, 2017, which will apply to any lottery prize claim submitted after January 1, 2018. This legislation, signed by Governor Abbott on June 12, 2017, permits a lottery prize winner of \$1,000,000 or more, who is a natural person, the opportunity to elect to remain anonymous, in certain instances, by prohibiting all personally identifiable information from being released to the public. Prior to this legislation, the name of the prize winner, whether a natural person or legal entity, was released to the public pursuant to the Texas Public Information Act. Additionally, the name of a prize winner who is a natural person, but who elects to receive the prize payments in periodic installments, will only be withheld for thirty (30) days from the date of the claim. House Bill 59 requires the Commission to adopt rules and procedures to implement this law no later than December 1, 2017.

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 new rule 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 new rule will be in effect, the public benefit anticipated is the opportunity for certain prize winners of a lottery prize in an amount equal to \$1 million or more to elect to remain anonymous and prohibit all personally identifiable information from being released to the public.

The Commission requests comments on the proposed new rule from any interested person. Comments on the new rule may be submitted to Deanne Rienstra, 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 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.