

Oregon State Lottery



WRITTEN TESTIMONY

Date: June 10, 2013

To: The Honorable Betsy Johnson, Co-Chair
The Honorable Bob Jenson, Co-Chair
Joint Committee on Ways and Means Subcommittee on Transportation and Economic Development

From: Larry Niswender, Director
Oregon State Lottery

Re: HB 2163A

Amends ORS 461.200 and requires the Lottery to balance its mission to maximize revenues with its mission to serve the public good through various activities and choices.

Good afternoon. For the record, my name is Larry Niswender. I am the Director for the Oregon Lottery[®]. The Oregon Lottery is not taking a position on this bill, as of today. The testimony is to provide factual and historically relevant information to inform the Committee, to highlight relevant current law provisions, to share policy considerations, and address any questions you may have for the Lottery.

The House Human Services and Housing Committee held a work session on HB 2163 on April 11, 2013. At that work session, the -4 amendments were adopted (which was a gut and stuff), printed as A-engrossed, passed to the floor and referred to Ways and Means by prior reference. At that work session, there was no testimony or explanation of the amendments. As a result there is no record of intent, no record to clarify the purpose of the amendments, and no testimony on the desired outcomes from this piece of legislation.

Discussion:

While the Lottery is not taking a position on the bill, the bill still raises policy, legal, fiscal, and funding source concerns.

Note: The Lottery has recently received DOJ legal advice that has provided guidance on what Lottery administrative funds can be used for to address requirements of this bill related specifically to “minimizing the risks of harms”, versus the implementation and operation of the Lottery.

Since HB 2163A would require new activities that would have a fiscal impact, I am encouraged that it has been provided a hearing today to take testimony in this Committee. This will provide time and opportunity to determine which, if any, of the new activities can be funded through Lottery resources and which would require another funding source, such as the General Fund.

In General

The language in HB 2163A is broad in its coverage and new phrases are introduced. As such, it will be critical from Lottery’s perspective that the Committee place more information into the legislative record on the meaning of certain new phrases (ex., mission to serve the public good) and be clear about what the Lottery is to do (that is new or enhanced) and the rationale. This will help with implementation, and if/when any subsequent review of the legislative record is necessary, there will be guidance.

The new requirements of HB 2163A have not yet been discussed by the sponsor so there has not yet been any opportunity to confirm if the intent is for the Lottery to undertake new activities or increase activities and expenditures in any significant way. It is also not yet clear if the intent of the measure is to reduce the Lottery's ability to sell tickets and shares and continue to produce similar biennial net profit amounts.

1. New Statutory Directive for New Mission:

HB 2163A would introduce new statutory directives and redefine Lottery’s mission. The implications of these changes are not clearly understood.

Changing the mission for the agency that is the second largest revenue source for the state (behind income taxes) , when it has not been changed once since the Lottery was approved by the voters in 1984 is no small matter, so careful consideration is necessary.

The mission changes direct that the **Oregon State Lottery shall:**

Balance its mission to maximize revenues with its mission to serve the public good through activities and choices that (do only two things):

- (a) Fairly and honestly inform users of Lottery games of the potential risk for abuse of Lottery games; and
- (b) Address and encourage responsible use of Lottery games.

More information is needed to fully understand what it means “to serve the public good” through only these two cited activities and choices. As worded, the language narrowly defines the public good as only those things related to information about potential risks and encouraging responsible use.

Instead of the focus being on the public as a whole, which the Lottery and DOJ have concluded was the intent of the voters in adopting the Lottery Act, the focus of the “public good” then becomes strictly limited to informing users about potential harms and responsible use of Lottery products.

Obviously there are other considerations related to the “public good” that Lottery considers in its operations and the sale of its products. If this wording is constitutional, which is questionable, this would mean that Lottery would not be able to consider other things related to the “public good”, such as:

- Who the Lottery chooses as retailers (currently cannot have associations with organized crime, criminal background, etc.),
- Where Lottery games are sold (i.e., concentrations impacting neighborhood livability, safe selling environments, the areas where Lottery products sold etc.), and
- Policies related to Lottery’s purchase of goods and services (paying more for environmentally friendly products or recycled materials).

By shifting the “public good” away from considerations related to the public as a whole, this could have unintended consequences which could ultimately impact Lottery’s primary responsibility to raise revenue for the public purposes described in the Constitution.

For example, if the duty is to maximize revenue commensurate with informing users about responsible play, the language in the bill may be interpreted as requiring Lottery to sell its products only in those areas where it has determined there is a high volume (where it can make the most money), without consideration for how that impacts the surrounding neighborhood (i.e., Hayden Island) or whether Lottery games are available in rural areas, as long as there is messaging to Lottery players related to responsible use of Lottery games.

The Lottery also has concerns about the language that attempts to define Lottery's mission as maximizing revenue and serving the public good. This is where we think the constitutionality is questionable. Lottery's mission as set forth in the Constitution is to be a self-supporting agency that raises revenue for the public purposes enumerated in the Constitution. While ORS 461.200 further directs the Lottery to maximize revenue to the extent that it has considered the public good, i.e., not at any cost but in a responsible manner, ORS 461.200 does not attempt to redirect Lottery's constitutional mission.

The amendments in Section 1 of HB 2163A attempt to establish a new mission for the Lottery which is to "serve" the public good. Whether this is permissible is unclear. Certainly, use of Lottery administrative funds in furtherance of this new "mission" is still constrained by the Constitution as specified in *Ecumenical Ministries* and as DOJ has outlined in Opinion 2013-2, dated March 18, 2013, which place limits on allowable uses of Lottery administrative funds.

Beyond these concerns, it will also be helpful to better understand what more the proponents want the Lottery to do and the desired outcome of this change.

2. New Statutory Directive for New Comprehensive Policy:

HB 2163A also introduces a new statutory directive for a new policy for the implementation and operation of the Lottery and the implications of this directive are not clearly understood. These words direct that the **Director of the Oregon State Lottery and the Lottery Commission shall:**

- Adopt a comprehensive policy for implementation and operation of the Lottery that ensures the integrity, security, honesty and fairness of the lottery games and the marketing practices and retail regulations of the games. (Section 3(1)).

More information is needed to fully understand the meaning of the phrase “and the marketing practices and retail regulations of the games”, what more the proponents of this legislation want the Lottery to be required to do, and what is the desired outcome.

3. Terms Still Not Clearly Understood:

HB 2163A also introduces new statutory terms that build in (codify) new directives for the Lottery and the implications of some of these terms are not yet clearly understood (Section 3). For example, words direct that the Lottery adopt a policy that includes:

- Strategies to ensure that lottery games and the marketing and promotion of lottery games are implemented:
 - Subject to awareness and analysis of the best available research into the effects of lottery games and marketing activities on vulnerable users of lottery games; and
 - Using methods designed to raise revenue and protect the public good.
- Strategies to minimize the risks of harms to individuals whose struggles with mental health and addiction issues might be caused or affected by the marketing and promotion of lottery games;

Once again, more information is needed to fully understand what these policy terms and new requirements mean; what more the proponents of this legislation want the Lottery to be required to do; and the desired outcome.

4. Joint Reporting with the Oregon Health Authority:

The bill requires the Lottery Commission to report annually to an appropriate session or interim human services committees:

- Data collected regarding use of computer terminals and devices utilized to deliver lottery games, including patterns of heavy or light usage of terminals and devices by location, time of day, and seasonal periods; and
- The efforts of the commission consistent with the obligations to maximize the amount of net revenues commensurate with the public good, to utilize the usage data in policy and program decision-making to minimize the risks of harm for individuals.

More information is needed to better understand the intent and desired outcome of this new language. It is possible that participation in the above described new activities will require the Lottery Commission to have access to an alternative funding source as it appears to require the Commission to engage in prevention activities.

5. Intent Still Not Yet Clear:

If the intent is to modify the policy direction set in place by the Oregon Constitution, existing laws, and the Lottery Commission's current policies, there are significant policy implications.

If the effect of the bill is to require the Lottery to seek ways to reduce consumer play of Lottery games, then less play can only have one result and that will be to reduce Lottery revenues and the amount available for transfer for public purposes. Every 1% decline in Lottery biennial revenues amounts to approximately \$11 million.

There is also a potential issue relative to Lottery's bonding capacity and the impact of any perceptions of the bond market resulting from the mission change contained in the bill.

To the extent that the measure requires the Oregon Lottery[®] to do something new or different from what it is currently constitutionally or statutorily required to do would have costs. Any cost amount is indeterminate at this time.

To the extent that additional Lottery operational costs would need to be incurred, it would correspondingly reduce the amount of Lottery Funds transferred for public purposes. Any revenue reduction amount is indeterminate at this time.

If the measure requires new activities that are not directly related to the operation or administration of the Lottery, the activities would need to be supported by an alternative fund source, such as the General Fund. This is supported by the Oregon Constitution, laws, court decisions, and DOJ opinions. Any amount is indeterminate at this time.

If the nature of these activities is more appropriately carried out by DHS or the Oregon Health Authority, a contract treatment provider, or a consultant, perhaps as a policy matter, a different agency may need to be directed to fulfill the measure's requirements.

6. Commensurate with the Public Good:

The Lottery's current statutory mandate requires it to operate the Lottery to produce the maximum amount of net revenues for the people of Oregon commensurate with the public good. In operating commensurate with the public good, the Lottery strives to promote responsible gambling in its:

- Advertising of Lottery products and public information ads targeted to responsible gaming;
- Website that prominently displays a link to Lottery's responsible gambling guidelines and links to information and treatment sites;
- Retailer contract by forbidding the sale of Lottery products to underage or intoxicated persons; and
- Responsible gaming messaging at Video LotterySM game terminals and retailer locations where Lottery products are sold.

Lottery also operates commensurate with the public good by:

- Regularly utilizing temporarily formed and specifically focused administrative rules advisory committees and advisory work groups (for rules, policies, and marketing strategies);
- Actively soliciting public input (through research and rules hearings) on its operations, game features, advertising, and public information campaigns;

- Providing public input/comment time at monthly Lottery Commission meetings;
- Coordinating efforts with other agencies (including the Oregon Health Authority, the Problem Gambling Council, the Oregon Liquor Control Commission, and the Child Support Division);
- Enforcing retailer contract provisions for all Lottery retailers; and
- Minimizing its administrative costs and transferring approximately \$1.1 billion per biennium to be used for public education, economic development, parks, and salmon restoration.

The Lottery believes that, through these activities, it is making a good faith effort to conduct itself in ways that are commensurate with the public good.

Most adults who choose to gamble do so responsibly, and research (from both the National Council on Problem Gambling and the Association of Problem Gambling Service Administrators) indicates that about one to three per cent of U.S. adults meet the criteria of problem gamblers. To address the needs of problem gamblers, Oregon has what is considered to be one of the best, if not the best, dedicated-funded problem gambling treatment program in the United States. The state operates a problem gambling help line 24 hours a day, 7 days per week. Treatment is confidential, effective, and free.

7. Closing:

If the policy choice is made by the Legislature to amend the Lottery's mission statement, then the Lottery will want to make sure that the legal, practical, and funding source concerns are fully addressed through this Ways and Means Committee critical review.

This concludes my prepared testimony on this bill. If you have any questions, I would be happy to address them.