

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 3 Prohibition of Simulated Gambling Devices

SPONSOR(S): Business & Consumer Affairs Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Business & Consumer Affairs Subcommittee		Morton/Rojas	Creamer

SUMMARY ANALYSIS

Over the past several years, Florida has witnessed a proliferation of electronic sweepstakes, which simulate casino-style games. Local authorities throughout the state have reacted differently, with some relying on current state law to shut down the operations, some passing local prohibitions and others adopting local regulations. Local authorities report concerns that the current statutes, which predate the technology at question, are unclear.

The PCS would clarify current laws concerning charitable drawings, game promotions and slot machines.

As to slot machines, the PCS would:

- specifically prohibit the use of operator-provided electronic or mechanical devices in relation to participation in charitable drawings and game promotions;
- update the definition of slot machine to specifically include systems or networks of devices and to remove technologically obsolete criteria; and
- provide a rebuttable presumption that machines used to simulate casino-style games in schemes involving consideration and prize are prohibited slot machines.

As to charitable drawings, the PCS clarifies the definition of a charitable drawing and specifically provides that compliance with the charitable drawing statute does not provide an exemption from other gambling prohibitions.

As to game promotions, the PCS:

- clarifies the definition of a game promotion;
- clarifies that nonprofit organizations may not conduct game promotions;
- specifically provide that compliance with the game promotion statute provides an exemption from the lottery prohibition, but does not provide an exemption from other gambling prohibitions.
- transfers oversight of game promotions to DBPR.

The bill is not anticipated to have a significant fiscal impact on state funds.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Electronic Sweepstakes

Over the past several years, Florida and other states have witnessed a proliferation of electronic sweepstakes. The electronic sweepstakes are offered at establishments offering communications services, such as internet access or telephone calling cards. Often these establishments are promoted using casino themes, and sweepstakes are played using casino-style games.

Game Play

The following outlines game play from a player's perspective:

1. A player purchases Internet access at a point of sale (POS) or a recharge station and receives an account, represented by a card or a number.
2. The player uses the account card or number at a player terminal and sets his or her wagers and begins game play.
3. The terminal displays a game, such as spinning reels, and the resulting outcome.
4. The player returns to the POS to cash out his winnings.

Electronic Sweepstakes System

The electronic sweepstakes system is comprised of a central computer system for managing user accounts and a user computer system, which includes devices that together allow a user to purchase internet access, use the purchased internet access, and reveal assigned sweepstakes entries.

Central System:

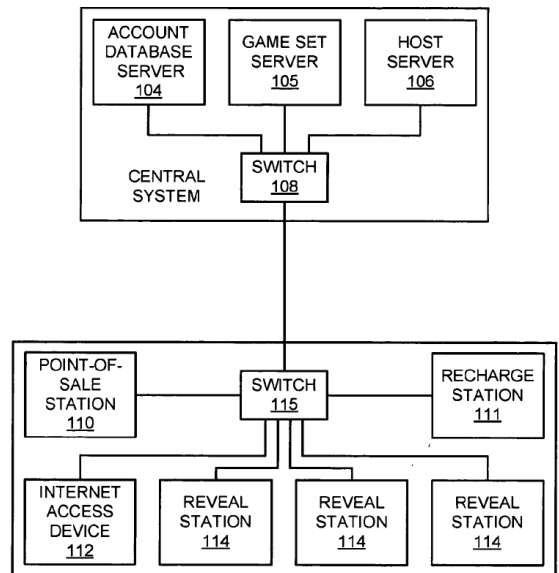
- Stores sweepstakes entries, games and user accounts
- Manages decisions
- Sends game information to User System
- Comprised of three devices:
 - Account database server
 - Game set server
 - Host server

User System:

- Allows users and operators to interact with Central System
- Sends user information to Central System
- Displays game information from Central System to users

Switches handle communication between the two systems. Sweepstakes entries, games and user accounts are stored on the central system. Sweepstakes entries may be revealed in a different order than they are assigned to the account. This feature can be used to set play characteristics, such as win frequency or prize distribution. The following outlines the technical game play:

1. A player purchases internet access at a point of sale (POS) or a recharge station and receives an account, represented by a card or a number.



This diagram, from patent US 20070135209A1, illustrates a sweepstakes system. Each item can be a separate device, or multiple items can be within one device.

2. The central system assigns sweepstakes entries to the user's account based on the amount of internet access purchased. Some of these entries are designated as winning outcomes.
3. The player uses the account card or number at a reveal station and sets his or her wagers and begins game play.
4. The reveal station sends the user's account number to the Central System and requests the chosen game.
5. The Central System selects one or more sweepstakes entries and sends the reveal station a game result, including a prize value, corresponding with the total winning and losing outcomes of the entries. Some systems may determine the prize value, and then select sweepstakes entries to add up to that cumulative value.

Internet Cafés

Electronic sweepstakes are generally offered at retail establishments called 'Internet Cafés'. While most sell internet access, some sell telephone calling cards. Relying on information supplied by the industry, Florida State University's Center for Economic Forecasting and Analysis developed a model of the average Internet Café: it employs about 13 people and generates between \$62,000 and \$400,000 in sales per month.¹

Because the majority of Internet Cafés sell internet access, the state receives little or no revenue from the operations. The federal Internet Tax Freedom Act has imposed a moratorium on the taxation of internet access since 1998, and will be effective until 2014, if not renewed by Congress.² Some operators may be subject to federal taxation and state payroll taxes and corporations operating Internet Cafés may be subject to state corporate income tax.

Legality

Florida courts have not examined whether electronic sweepstakes are legal. Local governments vary in their treatment of the games, and many claim the legality is uncertain.³ While no appellate court has examined the legality of the games, prosecutions have had varied results, with jury trials resulting in not guilty verdicts;⁴ numerous plea bargains resulting in guilty or no contest pleas; and at least one dismissal based on a lack of evidence.⁵ Local authorities complain that prosecutions are difficult and costly as they require technical experts and may sometimes require proving that operators knew the games were illegal.

Operators of electronic sweepstakes rely on statutes regulating game promotions and charitable drawings to argue that the games are legal. These statutes predate the technology and do not provide an exception from the prohibition on slot machines.

Slot machines

Slot machines have been generally prohibited in Florida since 1937.⁶ Slot machines are authorized at certain facilities in Broward and Miami-Dade counties by constitutional amendment or statute.⁷

¹ *Review Internet Cafes Used for Electronic Game Promotions*, Senate Regulated Industries Interim Report 2012-137 (October 2011), discussing *The Economic Impact of Internet Cafes in Florida*, Final Report, Center for Economic Forecasting and Analysis, The Florida State University (May 2011).

² Pub. L. 105-277, 112 Stat. 2681-719; *last renewed* by Pub. L. 110-108, 121 Stat. 1024-1026.

³ *See Local Treatment, infra* at p. 6.

⁴ *State v. Crisante*, 42-2010-CF-001543-BXXX-XX (Marion County).

⁵ *See, e.g., State v. Reed*, 42-2009-CA-004574-AXXX-XX (dismissed); 42-2010-CF-001505-AXXX-XX (nolle prosequi) (Marion County); and *State v. Ames*, 602009CF000951XXAFX (nolle prosequi) (Sumter County).

⁶ Section 849.15, F.S., originally enacted by s. 1, ch. 18143, L.O.F. (1937).

⁷ *See* Article X, Section 23, Florida Constitution; ch. 2010-29, L.O.F. and chapter 551, F.S.

Florida statutes treat any machine as a slot machine or device if, as a result of the insertion of any object, the user, by any element of chance or unpredictability, may receive any thing of value.⁸ The Florida Supreme Court has found that “the element of unpredictability is not supplied because a player may not be sure what score he can accomplish, but that it must be inherent in the machine.”⁹

Promoters of electronic sweepstakes argue the games are not slot machines because there is no element of chance inherent in the machine that the player uses. They argue that the games just offer entertaining ways to reveal the sweepstakes’ outcome. Two out-of-state courts have rejected this argument, finding that the whole system amounts to a slot machine. Alabama’s Supreme Court, the first state supreme court to examine the devices, explained,

Today, “most slot machines in casinos are not manually operated.” More and more, such machines are controlled by computer. Indeed, modern slot machines may be “stand-alone or network computers.” Thus, a device is no less a slot machine because it operates within a network, that is, because it shares computer-processing equipment with a number of similar devices. ..

In this case, the element of chance is satisfied at the point of sale-before the readers are activated-by the same central database and other computer equipment that serve to operate the readers. It is immaterial that the readers do not, themselves, assign values to the entries. In short, the element of chance is as much a feature of the MegaSweeps network system as of a stand-alone slot machine.¹⁰

Likewise, a Mississippi appellate court examining the scheme came to the same conclusion, explaining:

The element of chance is considered from the player's point of view; “[w]hat the machine ‘knows’ does not affect the player's gamble.” Additionally, the Barber court concluded that even though the outcome of the sweepstakes entries was predetermined and not impacted by playing games on the electronic readers, the element of chance existed at the point of sale. We see no reason to find differently here. While playing the games at the computer terminals did not impact the outcome of the sweepstakes points, an element of chance still existed because a consumer who purchased a telephone card did not know whether the card contained a winning or losing sweepstakes points. This issue is without merit.¹¹

The Attorney General has opined that a precursor to the electronic sweepstakes model, a machine that dispensed 2-minute telephone calling cards with an attached game promotion, was an illegal slot machine.¹² The machine used a “finite cartridge, which contains 15,000 preshuffled cards, each with its unique personal identification number and winning or losing sweepstakes ticket. When these 15,000 cards are sold the sweepstakes has ended.” The Attorney General opined that “the principal function of the device ... is gambling, that is, the user inserts money and the machine operates to provide the user with a sweepstakes ticket that, *by reason of chance*, may entitle the recipient to a money prize. The incidental receipt of merchandise, in this case a telephone card, will not provide justification or authorization for the ownership, sale, or possession of a machine or device described in section 849.16, Florida Statutes.”

Game Promotions

⁸ Section 849.16, F.S.

⁹ *Deeb v. Stoutamire*, 53 So.2d 873, 875 (Fla.1951). *See also State v. Broward Vending*, 696 So.2d 851, 852 (Fla. 4th DCA 1997)(relying on the rationale of *Deeb* to determine certain games were slot machines).

¹⁰ *Barber v. Jefferson County Racing Ass'n*, 960 So.2d 599, 609-10 (Ala., 2006).

¹¹ *Moore v. Mississippi Gaming Com'n*, 64 So.3d 537, 541 (Miss.App., 2011).

¹² Fla. AGO 98-07; *see also* Fla. AGO 2008-35, opining that a machine dispensing instant bingo tickets is an illegal slot machine.

Businesses use game promotions as a marketing tool to promote their goods or services. While Florida law generally prohibits gambling and lotteries,¹³ game promotions have been regulated by statute since 1971.¹⁴ Before this time, the games were considered illegal lotteries.¹⁵

'Game promotion' is defined by statute as a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present.

The statute prohibits game promotions from requiring entry fees or proof of purchase to play, having predetermined winners, arbitrarily disqualifying entries, failing to award prizes, and advertising falsely.

If the total value of offered prizes exceeds \$5,000, the operator must:

- File with DACS a copy of the game rules and prizes seven days before the game promotion begins.
- Establish a trust account equal to the total retail value of the prizes.
- File a list of winners of prizes exceeding \$25 within 60 days.

"[T]he DACS is charged with processing and filing documents for game promotions. ... the fact that their filing documents have been reviewed and found complete ... does not mean that the promotion or game is legal and in compliance with the provisions of chapter 849, F.S."¹⁶ The DACS expressly informs each operator that registers a game promotion that it takes no position on the validity, efficacy, advisability, or propriety of the game.¹⁷

Violations of the statute are punishable as second-degree misdemeanors. Persons violating the statute may also be liable for civil fines.

The statute does not apply to activities regulated by the Department of Business and Professional Regulation (DBPR) or bingo. Television or radio broadcasting companies licensed by the Federal Communications Commission are exempt from the statute's reporting requirements. The statute defines 'operator' to exclude charitable nonprofit organizations.

The DACS received its first game promotion filing for an electronic sweepstakes in 2006.¹⁸ Over the next four years, it changed its policy concerning how electronic sweepstakes were registered six times. Originally, a filing was required per game promotion. Midway through 2006, a new policy required a filing per computer terminal. In 2008, a new policy allowed operators to file one package and not file for the remaining terminals. Then, in September 2009, the policy changed again. Operators were to divide the total prizes by the number of terminals. A filing was only required if the per terminal amount was more than \$5,000. By 2010, the policy had changed again, and filings were based on how many computer servers were being used. Since December 2010, the policy has been to require one filing per game promotion. However, what actually constitutes a single game promotion has not been applied in a uniform manner.

The following chart depicts the total number of game promotion filings the DACS processed in each of the last five fiscal years, how many of those were for electronic sweepstakes, and the revenues and costs associated with the department's regulation of game promotions.

¹³ See ss. 849.08 (gambling) and 849.09, F.S. (lotteries).

¹⁴ Sections 1-9, ch. 71-304, L.O.F.; Section 849.094, F.S.

¹⁵ *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854 (1939).

¹⁶ Fla. AGO 2007-48

¹⁷ Miriam Wilkinson & Eric Miller, Florida Game Promotions Statute: A Novel Application of an Exception to Florida's Prohibition on Gambling, 11 Gaming Law Rev 98, 98-99 (2007).

¹⁸ *Id.* at 100.

Fiscal Year	Filings		Revenues	Expenditures	Net
	Total	Electronic			
2006-2007	2,708	595	\$270,601	(\$393,170)	(\$122,569)
2007-2008	6,084	2,019	\$605,252	(\$467,588)	\$137,664
2008-2009	4,832	1,200	\$483,300	(\$561,552)	(\$78,252)
2009-2010	4,107	282	\$409,965	(\$513,793)	(\$103,828)
2010-2011	3,664	14	\$363,350	(\$261,118)	\$102,232

Charitable Drawings

Charities use drawings or raffles as a fundraising tool. Organizations suggest a donation, collect entries and randomly select an entry to win a prize.

While Florida law prohibits lotteries,¹⁹ an exemption is provided for qualified organizations to conduct drawings by chance, provided the organization has complied with all applicable provisions of ch. 496, F.S. Requiring a donation or any other consideration is prohibited.

'Drawing by chance' or 'drawing' is defined as an enterprise in which, from the entries submitted by the public to the organization conducting the drawing, one or more entries are selected by chance to win a prize. The statute excludes from the definition "those enterprises, commonly known as 'matching,' 'instant winner,' or 'preselected sweepstakes,' which involve the distribution of winning numbers, previously designated as such, to the public."

'Organization' is defined as "an organization which is exempt from federal income taxation pursuant to 26 U.S.C. s. 501(c)(3), (4), (7), (8), (10), or (19), and which has a current determination letter from the Internal Revenue Service, and its bona fide members or officers."

Violations of the statute are punishable as second-degree misdemeanors and deceptive and unfair trade practices.

Because the game promotion statute excludes charitable nonprofit organizations, such organizations offering electronic game promotions sometimes claim to operate under the charitable drawings exemption. However, as noted, the charitable drawing statute seems to limit drawings to those conducted after the collection of entries, rather than a sweepstakes, where the winning ticket is determined before distribution.

Local Treatment

Local governments throughout the state have approached electronic sweepstakes in the following ways: enforcement based on state law,²⁰ prohibition by local ordinance,²¹ regulation by local ordinance,²² zoning restrictions,²³ and moratoriums.²⁴

¹⁹ Section 849.09, F.S.

²⁰ See, e.g., Anthony Miller, Deputies raid internet cafes, My Fox Tampa Bay, July 15, 2011, available at http://www.myfoxtampabay.com/dpp/news/local/nature_coast/deputies-raid-internet-cafes-07152011; Jeff Butera, Raids for illegal gambling shut down three internet sweepstakes cafes in Pinellas County, ABC Action News, July 15, 2011, available at http://www.abcactionnews.com/dpp/news/region_pinellas/raids-for-illegal-gambling-shut-down-three-internet-sweepstakes-cafes-in-pinellas-county

²¹ Seminole County Ordinance 2011-1, available at http://www.seminolecountyfl.gov/ca/pdf/Ordinance_2011-1.pdf.

²² Duval County Ordinance 2010-326, available at <http://www.coj.net/NR/rdonlyres/ecnqya2zuril2tmbesnmsnc7j7rkqwe7koe5wr4ok5mfrz5ypj6bjzsh7hs27kiomyjl4ivoqmm2d3ldylbhwdt3gc/2010-326.doc>

²³ Volusia County Ordinance 2011-06, on file with Business & Consumer Affairs Subcommittee. Pat Hatfield, "Volusia County looks to zoning to limit sweepstakes operators," West Volusia Beacon (March 14, 2011), available at <http://www.beacononlinenews.com/news/daily/3592>

During the 2011 interim, staff of the Senate Regulated Industries Committee conducted a survey of local authorities.

The majority of the Sheriffs who responded to the survey indicated that they thought the statutes were either vague, insufficient, or failed to provide sufficient direction as to whether the activities conducted through the use of electronic game promotions were legal. The majority of State Attorneys who responded to the survey believe that the Internet Cafes are illegal gambling houses and the activities should be prohibited. As discussed above, a few State Attorneys stated that it was difficult to believe that customers were paying for Internet time and noted that very few people use the Internet time; instead, the State Attorneys responding to the survey believe the customers are using slot machines to gamble. In addition, the majority of the Chiefs of Police who responded to the survey believe the statutes are vague, the establishments are operating as illegal gambling establishments, and that they should be prohibited. Law enforcement also indicated that the ambiguities in the laws make it difficult to determine whether the facilities are operating permissibly or in violation of state law. Over 20 cities reported that they have an ordinance to prohibit or regulate the businesses, have passed a moratorium to study the issue, or are considering the passage of an ordinance or moratorium.²⁵

Proposed Changes

The PCS creates the Simulated Gambling Prohibition and Community Protection Act, and includes the following finding:

The Legislature finds that there is a compelling state interest in addressing the deleterious effects of the proliferation of electronic machines and devices used for simulated gambling. The Legislature declares that it is the intent of this section to prohibit the use of such devices.

The PCS provides that nothing in the act may be construed to authorize the possession or operation of any machine or device prohibited under any other provision of law.

Electronic Gaming

The PCS specifically prohibits the use of mechanical or electronic machines, devices, networks or systems in relation to charitable drawings or game promotions that are controlled by the sponsor of the game and operated by game participants. Violation of these provisions in connection with a charitable drawing punishable as a first degree misdemeanor; violation in connection with a game promotion is punishable as a third degree felony.

Furthermore, the PCS updates the definition of slot machine or device by removing the requirement that such device be operated by the insertion of an object; specifically including 'system or networks' of devices; and provides that prohibited devices are, or may be, operated in exchange for consideration of any kind.

The PCS clarifies that a device is a prohibited slot machine regardless of whether: it is directly or indirectly operated, its outcome relies on skill or chance, or it is available for free play. It also clarifies that ch. 551, F.S., slot machines are included in the definition.

The PCS prohibits the manufacture, possession or sale of any prohibited gambling apparatus.

The PCS creates a rebuttable presumption that a device is a prohibited slot machine if it simulates games of chance and is part of a scheme requiring consideration and awarding any thing of value.

²⁴ Jerry Askin, Internet Cafe in Chattahoochee Forced to Shut Down, WCTV, July 8, 2011, *available at* http://www.wctv.tv/news/headlines/Internet_Cafe_in_Chattahoochee_Forced_to_Close_Its_Doors_125177944.html?ref=944.

²⁵ *Review Internet Cafes Used for Electronic Game Promotions*, Senate Regulated Industries Interim Report 2012-137 (October 2011).

Charitable Drawings

The PCS amends the current statute regarding charitable drawings by clarifying the definition of drawing by chance to include 'raffles' and to specifically exclude game promotions as defined by current law.

The PCS also specifically provides that compliance with the section does not provide an exemption from the prohibitions on keeping a gambling house or slot machines.

Game Promotions

The PCS amends the current statute regarding game promotions by clarifying the definition of game promotion to include 'sweepstakes' and to specify that the promotion is incidental to the sale of consumer products or services and to clarify that nonprofit organizations may not operate game promotions. Furthermore, the PCS provides an explicit exemption from the prohibition on lotteries and specifically provides that compliance with the section does not provide an exemption from the prohibitions on keeping a gambling house or slot machines. Violation of the game promotion statute, or soliciting violation of the section, is deemed an unfair trade practice.

The PCS transfers the oversight of game promotions to the Department of Business and Professional Regulation. The PCS also limits the DBPR's ability to authorize the use of machines to conduct game promotions.

Racketeering

The PCS amends the definition of 'racketeering activity' to include any violation of ch. 849, F.S., relating to gambling.

The PCS would become effective upon becoming law.

B. SECTION DIRECTORY:

Section 1 creates the "Simulated Gambling Prohibition and Community Protection Act" and provides legislative findings and intent.

Section 2 amends s. 849.0935, F.S., relating to drawings by chance offered by nonprofit organizations to revise definitions and conditions for exceptions to prohibitions on lotteries and to prohibit the use of devices operated by drawing entrants and provide penalties.

Section 3 amends s. 849.094, F.S., to revise definitions; transfer authority over game promotions from the Department of Agriculture and Consumer Services to the Department of Business and Professional Regulation; provide conditions for exceptions to prohibitions on lotteries; prohibit the use of devices operated by game promotion entrants; limit the rulemaking authority of the Department of Business and Professional Regulation; provide penalties; and provide that violations are deceptive and unfair trade practices.

Section 4 amends s. 721.111, F.S., relating to promotional offers to conform cross-references.

Section 5 amends s. 849.15, F.S.; to prohibit the production, possession, or distribution of any gambling apparatus.

Section 6 amends s. 849.16, F.S.; to revise definition machines or devices are subject to gambling provisions and provide a rebuttable presumption that a machine is a prohibited slot machine

Sections 7 and 8 reenact s. 338.234(1), 849.19, F.S., relating to the Florida Turnpike and the seizure of property, respectively, to incorporate changes made by the act in references.

Section 9 amends s. 895.02, F.S.; to revise the definition of the term "racketeering activity" to include violations of specified provisions.

Sections 10 through 13 reenact s. 16.56(1)(a), 655.50(3)(g), 896.101(2)(g), and 905.34(3), F.S., relating to the Office of Statewide Prosecution, money laundering, the Florida Money Laundering Act, and a statewide grand jury, respectively, to incorporate changes made by the act in references.

Section 14 provides for construction.

Section 15 provides the act will become effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill provides for new penalties for violations of the act. There is no Criminal Justice Impact Conference report available at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local governments that have authorized the use of the devices subject to local taxation will no longer be able to do so.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Establishments offering devices within the definitions of the bill will no longer be able to do so. To the extent that offering the games increases the profitability of their underlying products or services, they could see reduction in sales.

D. FISCAL COMMENTS:

The bill is not anticipated to have a significant fiscal impact on state funds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill transfers oversight of game promotions to the Department of Business and Professional Regulation and gives the DBPR rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES