

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 217 Prohibition of Simulated Gambling Devices

SPONSOR(S): Business & Consumer Affairs Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** SB 576

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

SUMMARY ANALYSIS

The PCS creates the Simulated Gambling Prohibition and Community Protection Act, which:

- Prohibits the use of simulated gambling devices in connection with a game promotion, sweepstakes, drawing, raffle or any game of chance.
- Defines a simulated gambling device as a device used by an entrant to a game of chance that displays visual or aural information which takes the form of actual or simulated gambling or gaming play.
- Would not apply to activities lawfully conducted pursuant to the Seminole Indian Compact or s. 849.161, F.S., relating to arcade amusement centers and truck stops.

The PCS expands the prohibition on slot machines or devices.

The PCS also amends statutes relating to the operation of game promotions and charitable drawings to:

- Prohibit the use of simulated gambling devices.
- Prohibit the use of any machine or device to conduct a drawing or game promotion that is owned or controlled by the organization or its affiliate and operated by game participants.
- Explicitly provide that charitable organizations cannot operate game promotions.
- Provide penalties.
- Limit the rulemaking authority of DACS to explicitly prohibit the authorization of the operation or possession of slot machines or devices or other devices prohibited by law and to prohibit the authorization of game promotions conducted through the use of machines or devices.
- Provide that compliance with DACS rules is not a defense to a charge of possession of a slot machine or device or any other device prohibited by law.

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

The PCS would be effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Electronic game promotions and drawings look and play like casino-style games, including slot machines. There is some uncertainty as to their legality and local law enforcement and governments vary in their treatment of the games.

The games are generally operated at Internet Cafés, which sell internet access and may use casino themes in advertising. Some establishments sell telephone calling cards instead of internet access. When patrons purchase internet time or a telephone calling card, they are given so many entries into a random drawing. These entries are loaded onto a card or account at the time of sale. The patron can determine whether they won by asking the cashier or playing casino-style games to reveal the results. The games are played on either desktop computers or slot-like cabinets. Winners are awarded with cash.

Game promoters claim the games are game promotions under s. 849.094, F.S., or charitable drawings under s. 849.0935, F.S. Neither statute explicitly authorizes or prohibits conducting the games using electronic devices.

Beyond registration with the Department of Agriculture and Consumer Services (DACS) for certain operators of game promotions, the games are not actively regulated or overseen by a state agency or taxed. Therefore, there is no definitive number of establishments offering electronic game promotions or drawings. Reported estimates vary from 350 to 1,000 locations.

Game Promotions

Businesses use game promotions as a marketing tool to promote their goods or services. These contests, often called 'sweepstakes,' give consumers the opportunity to win prizes in connection with the sale. Popular game promotions include McDonald's Monopoly Game and periodic contests offered by Pepsico and Mars Inc.

While Florida law generally prohibits gambling and lotteries,¹ game promotions have been regulated by statute since 1971.² Before this time, the games were considered illegal lotteries.³

'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 7 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

¹ See ss. 849.08 (gambling) and 849.09, F.S. (lotteries).

² Sections 1-9, ch. 71-304, L.O.F.; Section 849.094, F.S.

³ *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854 (1939).

game is legal and in compliance with the provisions of chapter 849, F.S.”⁴ 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.⁵

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.

In 2006, DACS received a game promotion filing from a company placing machines in truck stops. The machines dispensed phone cards for \$5 and awarded the player credits to play a video game, resembling slot machines. Winners were awarded in cash. This company filed 20 separate game promotions in February 2007, and DACS treated each machine as a separate game promotion.⁶ That same month, DACS began to see an influx of similar game promotions throughout the state.⁷

By November 2008, there were at least 61 registered electronic game promotions. By 2009, there were 282. Since then, operators have limited the value of their prizes to \$5,000, thereby removing themselves from the registration requirements. Currently, no electronic game promotions are registered with the DACS.

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,⁸ an exemption is provided for qualified organizations to conduct drawings by chance, provided the organization has complied with all applicable provisions of chapter 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.”

It is unlawful for any organization that promotes, operates, or conducts a drawing by chance to:

- Design, engage in, promote, or conduct any drawing in which the winner is predetermined by means of matching, instant win, or preselected sweepstakes or otherwise, or in which the selection of the winners is in any way rigged;
- Require an entry fee, donation, substantial consideration, payment, proof of purchase, or contribution as a condition of entering the drawing or of being selected to win a prize. However,

⁴ Fla. AGO 2007-48

⁵ 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).

⁶ *Id.* at 100.

⁷ Review of Electronic Gaming Exceptions for Adult Arcades and Game Promotions, Interim Report No. 2009-123, Florida Senate Committee on Regulated Industries, November 2008, *available at*

http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-123ri.pdf.

⁸ Section 849.09, F.S.

this provision shall not prohibit an organization from suggesting a minimum donation or from including a statement of such suggested minimum donation on any printed material utilized in connection with the fundraising event or drawing;

- Condition the drawing on a minimum number of tickets having been disbursed to contributors or on a minimum amount of contributions having been received;
- Arbitrarily remove, disqualify, disallow, or reject any entry or to discriminate in any manner between entrants who gave contributions to the organization and those who did not give such contributions;
- Fail to promptly notify, at the address set forth on the entry blank, any person, whose entry is selected to win, of the fact that he or she won;
- Fail to award all prizes offered;
- Print, publish, or circulate literature or advertising material used in connection with the drawing which is false, deceptive, or misleading;
- Cancel a drawing; or
- Condition the acquisition or giveaway of any prize upon the receipt of voluntary donations or contributions.

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.

Slot machines

Slot machines have been generally prohibited in Florida since 1937.⁹ Slot machines are authorized at certain facilities in Broward and Miami-Dade counties by constitutional amendment or statute.¹⁰

Florida statute treats 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.¹¹ 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.”¹²

Promoters of electronic game promotions argue the games are not slot machines because there is no element of chance ‘inherent in the machine.’ They argue that the games just offer entertaining ways to reveal the sweepstakes’ outcome. Some courts have found that the whole system amounts to a slot machine.¹³

Local Treatment

Seminole County passed an ordinance to ban all simulated gambling devices,¹⁴ which is currently being challenged as an unconstitutional limitation on free speech.¹⁵ Other counties, including Baker¹⁶ and Leon,¹⁷ have considered ordinances banning the games.

⁹ Section 849.15, F.S., originally enacted by s. 1, ch. 18143, L.O.F. (1937).

¹⁰ See Article X, Section 23, Florida Constitution; ch. 2010-29, L.O.F. and chapter 551, F.S.

¹¹ Section 849.16, F.S.

¹² *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).

¹³ See *Barber v. Jefferson County Racing Association*, 960 So.2d 599, 608 (Ala. 2006).

¹⁴ Seminole County Ordinance 2011-1, available at http://www.seminolecountyfl.gov/ca/pdf/Ordinance_2011-1.pdf.

¹⁵ *Allied Veterans of the World v. Seminole County*, case 6:11-cv-155-Orl-28DAB (Mid. Dist. Florida 2011). A temporary restraining order has been issued to enjoin Seminole County from enforcing the ordinance, available at <http://www.leoncountyfl.gov/ADMIN/Agenda/attach/110222/A2102.pdf>

¹⁶ Baker County Proposed Ordinance 2011-01, on file with Business & Consumer Affairs Subcommittee.

¹⁷ Agenda Item, Board of Leon County Commissioners, (Feb. 22, 2011), available at http://www.leoncountyfl.gov/ADMIN/Agenda/view.asp?item_no='21'&meeting_date=2/22/2011

Duval County regulates and taxes the games and has limited the number of locations.¹⁸ Other local governments, including DeBary, Deltona City, Orange City, and Volusia County,¹⁹ have considered zoning ordinances to restrict their placement.²⁰

No appellate court has examined the legality of the games. One jury trial resulted in a not guilty verdict.²¹ Other cases have been brought, but dismissed by prosecutors and one has been dismissed by the judge for lack of evidence.²²

Proposed Changes

Simulated Gambling Prohibition and Community Protection Act

The PCS creates the Simulated Gambling Prohibition and Community Protection Act to prohibit the use of simulated gambling devices in connection with a game of chance.

The PCS provides legislative intent to address “the deleterious effects of the proliferation of electronic machines and devices used for simulated gambling or gaming” and to prohibit such machines or devices. The PCS also provides the following statements for construction purposes:

- A finding that a device is a simulated gambling device does not preclude a finding that it is also a slot machine under s. 849.16.
- It is the intent of the Simulated Gambling Prohibition Act to prohibit any mechanism that seeks to avoid application of the section through the use of any subterfuge or pretense.
- Nothing in the PCS may be construed to authorize the possession or operation of any machine or device prohibited under any law.

The PCS includes the following definitions:

- ‘Simulated gambling device’: “a mechanically or electronically operated machine, network, system or device that is intended to be used by an entrant to a game promotion, sweepstakes, drawing, raffle or any game of chance and that is capable of displaying a simulated gambling display on a screen or other mechanism.”
- ‘Simulated gambling display’: “visual or aural information capable of being perceived by an entrant which takes the form of actual or simulated gambling or gaming play. The term includes, but is not limited to, displays depicting the following types of games:
 1. Reel games or simulations of reel games, such as slot machines, eight liners or pot-of-gold.
 2. Card games or simulations of card games, such as video poker.
 3. Video games representing a game regulated by Florida law, such as bingo, sweepstakes, game promotions, drawings, or raffles.
 4. Video games representing a game prohibited by Florida law, such as craps, keno, and lotteries.
 5. Any video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols.

¹⁸ Duval County Ordinance 2010-326, *available at*

<http://www.coj.net/NR/rdonlyres/ecnqya2zuril2tmbesnmnc7j7rkqwe7koe5wr4ok5mfrz5ypj6bjzsh7hs27kiomyjl4ivoqmm2d3ldylbhwdt3gc/2010-326.doc>

¹⁹ Volusia County Ordinance 2011-06, on file with Business & Consumer Affairs Subcommittee.

²⁰ 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>

²¹ State v. Crisante, 42-2010-CF-001543-BXXX-XX (Marion County).

²² See, e.g., State v. Reed, 42-2009-CA-004574-AXXX-XX (dismissed); 42-2010-CF-001505-AXXX-XX (nolle prosequi) (Marion County); State v. Ames, 602009CF000951XXAFX (nolle prosequi) (Sumter County);

The PCS also provides that the use of the terms 'gambling,' 'gaming,' or 'game' does not incorporate any legal definition found elsewhere and does not necessitate the presence of elements of consideration, chance or prize.

The PCS provides that it is unlawful to design, promote or operate a simulated gambling device to conduct or promote a game promotion, raffle or game of chance. Violations are punishable as third-degree felonies and may serve as a predicate crime supporting a racketeering charge.

The PCS does not apply to activities lawfully conducted pursuant to the Seminole Indian Compact or s. 849.161, F.S., relating to arcade amusement centers and truck stops.

Charitable Drawings

The PCS amends s. 849.0935, F.S., relating to the operation of raffles by nonprofit organizations to:

- Amend the terms 'drawing by chance' and 'drawing' to include the term 'raffle' and specify that game promotions regulated under s. 849.094, F.S., are not included in their definition.
- Prohibit the use of simulated gambling devices in connection with drawings.
- Prohibit the use of any machine or device to conduct a drawing that is owned or controlled by the organization or its affiliate and operated by drawing participants.
- Provide that violations of prohibitions on simulated gambling devices or the use of player-controlled devices to conduct drawings is punishable as a first degree misdemeanor.

Game Promotions

The PCS amends s. 849.094, F.S., relating to the operation of game promotions to:

- Amend the definition of 'game promotion' to include the term 'sweepstakes' and to specify that game promotions are 'incidental' to the sale of consumer products or services.
- Amend the definition of 'operator' to include enterprises and organizations and to remove the exception as to nonprofit organizations.
- Explicitly provide that activities conducted in compliance with the section are not prohibited lotteries.
- Explicitly provide that organizations eligible to conduct drawings by chance pursuant to s. 849.0935, F.S., cannot operate game promotions.
- Prohibit the use of simulated gambling devices in connection with game promotions.
- Prohibit the use of any machine or device to conduct a game promotion that is owned or controlled by the organization or its affiliate and operated by drawing participants.
- Provide that violations of prohibitions on simulated gambling devices or the use of player-controlled devices to conduct game promotions is punishable as a third degree felony.
- Provide that violations, or solicitations to commit violations, are deceptive and unfair trade practices, enforceable by the state attorney or Department of Legal Affairs.
- Limit the rulemaking authority of DACS to explicitly prohibit the authorization of the operation or possession of slot machines or devices or other devices prohibited by law and to prohibit the authorization of game promotions conducted through the use of machines or devices.
- Provide that compliance with DACS rules is not a defense to a charge of possession of a slot machine or device or any other device prohibited by law.

Slot Machine Prohibition

The PCS amends s. 849.15, F.S., to expand the prohibition on slot machines or devices to include other prohibited 'gambling apparatus or parts thereof.'

The PCS amends s. 849.16, F.S., to expand the definition of slot machines or devices to:

- Include in the types of device, a 'system or network of computers or other devices.'
- Include in the method of activation, the insertion of any 'code, account number or credit' or 'method of activation' 'whether directly or as the result of indirect remote activation.'

B. SECTION DIRECTORY:

Section 1 creates s. 849.162, F.S., "Simulated Gambling Prohibition Act," to prohibit the use of simulated gambling devices to conduct or promote game promotions, drawings and games of chance.

Section 2 amends s. 849.094, F.S., to prohibit the use of simulated gambling devices or other devices operated by game promotion entrants.

Section 3 amends s. 849.15, F.S., to prohibit production, possession, or distribution of any gambling apparatus.

Section 4 amends s. 849.16, F.S., to provide that described machines or devices are subject to gambling provisions.

Section 5 amends s. 895.02, F.S., to include violations of the act as "racketeering activity."

Sections 6 through 12 reenact ss. 16.56(1)(a), 338.234(1), 655.50(3)(g), 721.111(2), 849.19, 896.101(2)(g), 905.34(3), F.S., to incorporate in cross-references changes made by the act.

Section 13 provides the act goes into effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The PCS 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 PCS 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 PCS is not anticipated to have a 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Effect on Revenue Sharing under the Gaming Compact with the Seminole Tribe of Florida

In 2010, Florida and the Seminole Tribe of Florida entered into a compact to govern the operation of certain games at tribal facilities. As part of this compact, the Tribe agreed to make payments to the state in exchange for exclusivity. If the state authorizes Class III gaming or other casino-style gaming, payments to the state could be reduced or eliminated, depending on the location and type of game.

The compact defines 'other casino-style games' to include slot machines, electronically-assisted bingo or electronically-assisted pull-tab games, table games and video lottery terminals or any similar games, whether or not such games are determined through the use of a random number generator.

An exception is provided for games authorized by chapter 849, F.S., on February 1, 2010. As discussed above, Florida law does not explicitly authorize or prohibit conducting game promotions or drawings using electronic devices. If the games are found to have been prohibited on February 1, 2010, authorization of the games could impact revenue sharing.

The PCS would specifically prohibit electronic game promotions and drawings, so is not expected to impact revenue sharing under the compact.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES