

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Gaming

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BILL: SB 1030

INTRODUCER: Senator Thrasher

SUBJECT: Sweepstakes Devices

DATE: March 14, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Guthrie	Guthrie	GM	<b>Pre-meeting</b>
2.			RI	
3.			AP	
4.				
5.				
6.				

**I. Summary:**

SB 1030:

- Defines “sweepstakes device” as an electronic device operated in a game promotion, owned, leased or controlled by the operator or agent, and located in an establishment owned, leased, or controlled by the operator or agent;
- Provides that an operator who was using a sweepstakes device on or before July 1, 2013, and who files an affidavit may continue to operate the sweepstakes device;
- Provides that any current permit issued to the operator by a county or municipality shall be renewed upon expiration; and
- Provides that a new operator, after July 1, 2013, may not use a sweepstakes device or be issued a local permit.

This bill creates the following section of the Florida Statutes: 849.0945.

**II. Present Situation:**

In general, gambling is illegal in Florida.<sup>1</sup> Chapter 849, F.S., governs the conduct of gambling. Section 849.15, F.S., prohibits the manufacture, sale, lease, play, or possession of slot machines.<sup>2</sup> Florida’s gambling prohibition includes prohibitions against keeping a gambling house,<sup>3</sup> and running a lottery.<sup>4</sup> Section 7, Art. X of the Florida Constitution prohibits lotteries, other than

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<sup>1</sup> Section 849.08, F.S.

<sup>2</sup> Section 849.16, F.S., defines slot machines for purposes of ch. 849, F.S. Section 849.15(2), F.S., provides an exemption to the transportation of slot machines for the facilities that are authorized to conduct slot machine gaming under ch. 551, F.S.

<sup>3</sup> Section 849.01, F.S.

<sup>4</sup> Section 849.09, F.S.

pari-mutuel pools authorized by law on the effective date of the Florida Constitution, from being conducted in Florida by private citizens.<sup>5</sup>

Gaming is permitted at licensed pari-mutuel wagering tracks and frontons<sup>6</sup> and by the state operated lottery,<sup>7</sup> which must operate “so as to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens.”<sup>8</sup>

Chapter 849, F.S., contains other specific exceptions to the general gambling prohibition and authorizes certain gambling activities, such as cardrooms at pari-mutuel facilities,<sup>9</sup> bingo,<sup>10</sup> penny-ante poker,<sup>11</sup> arcade amusement games,<sup>12</sup> amusement games and machines,<sup>13</sup> and game promotions.<sup>14</sup> In Florida, if the gaming activity is not expressly authorized, then gambling is illegal. Free-standing, commercial casinos are not authorized in Florida.

During the past several years, electronic sweepstakes establishments, generally called “Internet Cafés,” have proliferated in Florida and other states. The facilities often use casino- style sweepstakes games to promote sales of communications services, such as internet access or telephone calling cards. The operations are not regulated by the state and the games are not taxed.<sup>15</sup>

Law enforcement and local district attorneys have raised concerns about whether the use of an electronic simulated gaming machine in a game promotion is an illegal slot machine.

Chapter 849, F.S., prohibits slot machines<sup>16</sup> and gambling houses.<sup>17</sup> Slot machines are authorized at certain pari-mutuel facilities in Miami-Dade and Broward counties.<sup>18</sup> Slot machines are also permitted on tribal facilities covered by the Seminole Indian Compact.<sup>19</sup>

<sup>5</sup> The pari-mutuel pools that were authorized by law on the effective date of the Florida Constitution, as revised in 1968, include horseracing, greyhound racing, and jai alai games. The revision was ratified by the electorate on November 5, 1968.

<sup>6</sup> See ch. 550, F.S., for the regulation of pari-mutuel activities.

<sup>7</sup> The Department of the Lottery is authorized by s. 15, Art. X, Florida Constitution. Chapter 24, F.S., was enacted by ch. 87-65, L.O.F., to establish the state lottery. Section 24.102, F.S., provides the legislative purpose and intent in regard to the lottery.

<sup>8</sup> See s. 24.104, F.S.

<sup>9</sup> Section 849.086, F.S. Section 849.086(2)(c), F.S., defines “cardroom” to mean a facility where authorized card games are played for money or anything of value and to which the public is invited to participate in such games and charges a fee for participation by the operator of such facility.

<sup>10</sup> Section 849.0931, F.S.

<sup>11</sup> Section 849.085, F.S.

<sup>12</sup> Section 849.161(1)(a), F.S.

<sup>13</sup> Section 849.161(1)(b), F.S.

<sup>14</sup> Section 849.094, F.S., authorizes game promotions in connection with the sale of consumer products or services.

<sup>15</sup> 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. Pub. L. 105-277, 112 Stat. 2681-719; *last renewed by* Pub. L. 110-108, 121 Stat. 1024-1026. Some operators may be subject to federal and state payroll and corporate income taxes.

<sup>16</sup> Section 849.15, F.S.

<sup>17</sup> Section 849.01, F.S.

<sup>18</sup> Article X, s. 23, Florida Constitution and ch. 551, F.S.

<sup>19</sup> *Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, approved by the U.S. Department of the Interior effective July 6, 2010, 75 Fed. Reg. 128. Slot machines are authorized for all seven gaming facilities. The Tribe has three gaming facilities located in Broward County (The Seminole Indian Casinos at Coconut Creek and Hollywood, and the Seminole Hard Rock Hotel & Casino-Hollywood), and gaming facilities in Collier County (Seminole Indian Casino-

Section 849.16, F.S., defines slot machines for purposes of ch. 849, F.S., as:

(1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may:

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or

(b) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

Section 551.102(8), F.S., defines a slot machine to mean:

any mechanical or electrical contrivance, terminal that may or may not be capable of downloading slot games from a central server system, machine, or other device that, upon insertion of a coin, bill, ticket, token, or similar object or upon payment of any consideration whatsoever, including the use of any electronic payment system except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance, terminal, machine, or other device to receive cash, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually. The term includes associated equipment necessary to conduct the operation of the contrivance, terminal, machine, or other device. Slot machines may use spinning reels, video displays, or both.

Generally, any machine or device is a slot machine if, as a result of the insertion of any object, the user, by any element of chance or unpredictability, may receive anything of value.<sup>20</sup>

According to the Florida Supreme Court, the unpredictability must “be inherent in the machine.”<sup>21</sup>

Some authorities familiar with Florida’s gambling laws have complained that prosecutions are difficult and costly, in part because of laws regulating charitable drawings, game promotions, and adult amusements are not as up-to-date and clear as they could be.

### **Charitable Drawings**

The staff analysis for PCS for HB 155, relating to Prohibition of Electronic Gambling Devices, published by the House Select Committee on Gaming on March 14, 2013, describes charitable drawings in the “Current Situation” section:

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Immokalee), Glades County (Seminole Indian Casino-Brighton), Hendry County (Seminole Indian Casino-Big Cypress), and Hillsborough County (Seminole Hard Rock Hotel & Casino-Tampa).

<sup>20</sup> Section 849.16, F.S.

<sup>21</sup> *Deeb v. Stoutamire*, 53 So.2d 873, 875 (Fla. 1951).

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,<sup>22</sup> 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.

### **Game Promotions**

Prior to the 2012 Regular Session, the Regulated Industries Committee prepared an Interim Report 2012-137, titled “Review Internet Cafes Used for Electronic Game Promotions.” It is published at <http://flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-137ri.pdf>, and it provides detailed background about game promotions.

The House Select Committee on Gaming staff analysis for PCS for HB 155, provides a succinct description of game promotions in the “Current Situation” section:

Businesses use game promotions as a marketing tool to promote their goods or services. Although game promotions generally require payment of money, the Florida Supreme Court has found that the game is a lottery, containing the three elements of consideration, chance and prize.<sup>23</sup>

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<sup>22</sup> Section 849.09, F.S.

<sup>23</sup> *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854 (1939).

In *Little River Theatre Corp. v. State ex rel. Hodge*, the Florida Supreme Court adopted a view that any benefit to the game promoter constitutes consideration. Thus, even if players do not pay to participate in the game promotion, it is an illegal lottery:

But while the patrons may not pay, and the respondents may not receive any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit.<sup>24</sup>

Since 1971, the games have been regulated by s. 849.094, F.S.<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup>

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.

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<sup>24</sup> *Id.* at 866-867 (quoting *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.*, 276 Mich. 127, 130-131 (1936)).

<sup>25</sup> Sections 1-9, ch. 71-304, L.O.F.

<sup>26</sup> Fla. AGO 2007-48.

<sup>27</sup> 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).

The DACS received its first game promotion filing for an electronic sweepstakes in 2006.<sup>28</sup> 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.

Fiscal Year	Total Filings	Electronic Filings	Revenues	Expenditures	Net
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

**Adult Amusements**

Prior to the 2009 Session, the Senate Regulated Industries Committee prepared Interim Report 2009-123, “Review of Electronic Gaming Exceptions for Adult Arcades and Game Promotions.” It found:

In 1984, the provisions dealing with arcade amusement centers were removed from s. 849.16, F.S., and placed in a newly created s. 849.161, F.S.<sup>29</sup> The provisions relating to amusement games and machines at any retail dealer who operates a truck stop were added in 1996.<sup>30</sup>

Section 849.161(1)(a)1., F.S., provides that:

Nothing contained in this chapter [ch. 849, F.S.] shall be taken or construed as applicable to an arcade amusement center having amusement games or machines which operate by means of the insertion of a coin and which by application of skill may entitle the person playing or operating the game or machine to receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.

Section 849.161(1)(a)2., F.S., provides that the provisions of ch. 849, F.S., shall not be taken or construed to apply to amusement games or machines located at “any retail dealer

<sup>28</sup> *Id.* at 100.

<sup>29</sup> *See* s. 2, ch. 84-247, L.O.F. This act attempted to place the arcade amusement center provisions in a newly created ch. 512, F.S. (as s. 512.01, F.S., the only section in the new chapter). The Division of Statutory Revision renumbered that section as s. 849.161, F.S.

<sup>30</sup> The provisions were added in three different sections in two different bills. *See* s. 159, ch. 96-320, and s. 79, ch. 96-323, L.O.F. Different provisions amending subparagraph (1)(a)2. and paragraph (1)(b) of s. 849.161, F.S., were also included in s. 69, ch. 96-323, L.O.F., and that version is noted in footnote 1 to s. 849.161, F.S.. For a description of multiple provisions in the same session affecting a statutory provision, see preface to the *Florida Statutes*, “Statutory Construction.”

who operates as a truck stop, as defined in chapter 336<sup>31</sup> and which operates a minimum of 6 functional diesel fuel pumps.” The machines at a truck stop may operate “by means of the insertion of a coin or other currency” and the points and coupons may be exchanged for “merchandise limited to noncash prizes, toys, novelties, and Florida Lottery products, excluding alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.”

An arcade amusement center must have at least 50 coin-operated amusement games or machines on the premises to qualify for this exception.<sup>32</sup> The provisions of s. 849.161(1), F.S., are not applicable to a coin-operated game or device that entitles a player, by application of skill, to replay the game at no additional cost and that can “accumulate and react to no more than 15 free replays; [that] can be discharged of accumulated free replays only by reactivating the game or device for one additional play for such accumulated free replay; [and that] can make no permanent record, directly or indirectly, of free replays.”

The provisions of s. 849.161(1), F.S., do not apply to:

any game or device defined as a gambling device in 24 U.S.C. s. 1171, [sic]<sup>33</sup> which requires identification of each device by permanently affixing seriatim numbering and name, trade name, and date of manufacture under s. 1173, and registration with the United States Attorney General, unless excluded from applicability of the chapter under s. 1178. This subsection shall not be construed to authorize video poker games or any other game or machine that may be construed as a gambling device under Florida law.

Several different types of establishments are operating under the exemption provided in s. 849.161, F.S. There are arcade amusement centers that cater predominantly to children. Chuck E. Cheese parlors are an example of this type of center. These centers cater to families with young children.<sup>34</sup> Tickets can be won at the games and redeemed for prizes on-site. Facilities known as “adult amusement centers” also operate under this section. Dave & Busters is an example of an adult amusement center that includes different types of games catering to adults.<sup>35</sup> These games include billiards, video games, and other games where tickets can be won and redeemed for prizes on-site. Dave & Busters also serves food and alcoholic beverages to its patrons. Electronic games are also located in truck stops that have six diesel pumps. Finally, electronic games are located at what are known as “senior arcade amusement centers.” The Florida Bingo and Arcade Association

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<sup>31</sup> Provisions referencing truck stops in ch. 336, F.S., was in s. 336.021(1)(c)3., F.S.; it was deleted by s. 15, ch. 97-54, L.O.F. Section 336.021(1)(c)3., F.S., provided, in part, that a “truck stop” is any retail dealer registered pursuant to chapter 212, excluding marinas, that has declared its primary fuel business to be the sale of diesel fuel.”

<sup>32</sup> See s. 849.161(2), F.S.

<sup>33</sup> Title 24 of the United States Code relates to hospitals and asylums; chapter 24 of Title 15 of the United States Code relates to transportation of gambling devices.

<sup>34</sup> See <http://www.chuckecheese.com/company-info> (Last visited October 31, 2008).

<sup>35</sup> See <http://www.daveandbusters.com/Misc/HousePolicies.aspx> (Last visited October 31, 2008).

represent 29 of these establishments in Florida.<sup>36</sup> According to the association, these arcades have been in operation since 1984. It also uses the term “penny arcades.”<sup>37</sup>

Some electronic games resemble traditional slot machines but are equipped with a “skill stop button” that supposedly stops the game activity when engaged. The electronic games that resemble slot machines and use a “skill stop button” have caused concern in the law enforcement community that these games may be violating the gambling devices provisions in ch. 849., F.S.

The FDLE addressed the Senate Regulated Industries Committee concerning some of these electronic games.<sup>38</sup> The department indicated that some adult arcades have operated in Florida without any rules, regulations, or industry norms. At issue is the use of particular types of gaming machines. The owners of adult arcade facilities, according to the department, have used vague interpretations of Florida gaming laws to open and operate what appear to be illegal gambling halls. The method of play in these adult arcades has created a grey area for enforcement and prosecution of illegal gambling across the state. The operators maintain that the devices in these adult arcades are legal under Florida law. They also maintain that the machines are not illegal gambling devices because they do not pay out in cash, they pay out only with merchandise in the form of gift cards, and operate by “application of skill” and not as games of chance.

### III. Effect of Proposed Changes:

Section 1 of the bill provides findings that:

- (1) The Legislature finds that there is an increasing proliferation of establishments that use computer or video displays to show the results of sweepstakes, contests, or other game promotions, which has created uncertainty and inconsistency in the application of existing laws, and further finds that the continued increase of such electronic devices may lead to adverse effects on persons in this state.
- (2) The Legislature also finds that to provide for the uniform and clear enforcement of existing law, to preserve the public peace and order, and to safeguard the health, safety, and welfare of the residents of this state, the Legislature should study these issues and pass appropriate legislation.
- (3) Therefore, the Legislature intends to limit the expansion and use of certain electronic devices in connection with game promotions until the Legislature can study the issue and enact appropriate legislation.

Section 2 of the bill creates s. 849.0945., F.S., relating to a moratorium on use of electronic devices in connection with game promotions. It:

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<sup>36</sup> See <http://www.floridaarcadeassociation.com/members.htm> (Last visited October 31, 2008).

<sup>37</sup> A penny arcade, according to the association, is an eight or nine line electronic machine where the play is a penny a line so that the maximum is eight or nine cents per play.

<sup>38</sup> Senate Regulated Industries Committee meeting, February 19, 2008.



- Defines “sweepstakes device” as an electronic device that is used in a game promotion, owned, leased, or controlled by an operator or agent, and located in an establishment owned, leased, or operated by an operator or agent.
- Provides that an operator using a sweepstake device on or before July 1, 2013, may continue to operate the device if the operator files an affidavit with the Department of Agriculture and Consumer Services by August 1, 2013, stating the address where each device is located and attesting to its use on or before July 1, 2013, and updates the affidavit at the time of any change.
- Provides that a permit issued by a county or municipality to an operator must be renewed; but a county or municipality is not otherwise prevented from regulating the use of sweepstakes devices in its jurisdiction.
- Provides that an operator may not use a sweepstakes device unless the operator was using it on or before July 1, 2013.
- Provides that a county or municipality may not issue permits, licenses, or other permission to operate to new operators.
- Provides that the section may not be construed to allow the use of a mechanical or electromechanical reel in connection with a game promotion.

Section 3 provides the bill will take effect July 1, 2013.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

A county or municipality must renew any current permit, license, or other permission to operate. No permit, license, or other permission to operate may be issued to any new operator or current operator who fails to timely file an affidavit as required by the bill.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Operators offering sweepstakes devices in connection with game promotions will be able continue to do so. No permission to operate will be issued to new operators.

**C. Government Sector Impact:**

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

**VI. Technical Deficiencies:**

A proposed committee substitute has been filed for this bill.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.