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Committee on Regulated Industries

REVIEW INTERNET CAFES USED FOR ELECTRONIC GAME PROMOTIONS

Issue Description

In November 2008, the Senate Committee on Regulated Industries issued Interim Report 2009-123: *Review of Electronic Gaming Exceptions for Adult Arcades and Game Promotions*. The report was initiated in response to complaints and inquiries surrounding adult arcades and electronic game promotions/sweepstakes/Internet Cafes (electronic game promotions are generally known as “Internet Cafes”) to determine if they were operating legally under ch. 849, F.S., the chapter that governs gambling in the state.

At the request of Senator Dean, this report reviews the current status of electronic game promotions within the state and provides an update to the 2009 study. The 2009 report discussed both arcade amusement machines operating under s. 849.161, F.S., and electronic game promotions operating under s. 849.094, F.S. This report focuses solely on electronic game promotions conducted at Internet Cafes. The report discusses that electronic game promotions operating at Internet Cafes have increased throughout the state in the last three years. The report notes that many jurisdictions have taken action or are considering action to either prohibit or to regulate Internet Cafes.

The report provides recommendations to the Legislature to consider for clarification on whether electronic game promotions are permitted under Florida law. The report recommends clarification to prevent unequal enforcement and disparate treatment across the state.

Background

Electronic Game Promotions

Although gambling is generally illegal,¹ game promotions are regulated under s. 849.094, F.S.² In 1971, the Legislature enacted s. 849.094, F.S., which provides for game promotions in connection with the sale of consumer products.³ Section 849.094(1)(a), F.S., defines “game promotion” as:

a contest, game of chance, or gift enterprise, conducted within or throughout the state or other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present. However, “game promotion” shall not be construed to apply to bingo games conducted pursuant to s. 849.0931.

This provision is intended to allow companies to promote their products or services with a promotion. Prior to the passage of this statute, game promotions were considered illegal lotteries. A game promoter, or “operator,” is defined as “any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, except any charitable nonprofit organization.”⁴

¹ Section 849.08, F.S., provides that “[w]hoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.”

² Section 849.094, F.S., does not explicitly authorize game promotions but instead defines the term “game promotion” and provides requirements for the conduct of certain game promotions. See *Beasley Broadcasting, Inc. v. Department of State, Division of Licensing*, 693 So.2d 668 (Fla. 2d DCA 1997).

³ See ss. 1-9, ch. 71-304, L.O.F.

⁴ Section 849.094(1)(b), F.S.

The law prohibits operators from manipulating their game promotion so that all or part of the winning game pieces are allocated to certain franchisees, agents, or lessees, or to certain geographic areas of the state. Operators may not:⁵

- Arbitrarily remove, disqualify, disallow, or reject any entry;
- Fail to award the prizes advertised;
- Publish false or misleading advertising about the game promotion;
- Require an entry fee, payment, or proof of purchase as a condition of entering the game promotion; or
- Force a lessee, agent, or franchisee to participate in a game promotion.

There is no license required to conduct a game promotion and game promotion proceeds are not taxed. Instead, operators of a game promotion with an announced total prize value of greater than \$5,000 must register the game promotion with the Department of Agriculture and Consumer Services (DACS or department)⁶ and comply with the following requirements:

- File with DACS at least 7 days before the commencement of a game promotion a copy of the rules and regulations of the game promotion and a list of all prizes and prize categories offered. A \$100 non-refundable fee to DACS must accompany each filing.⁷
- Conspicuously post the rules and regulations of the game promotion in each retail outlet or place where the game is played or participated in by the public.⁸
- Legibly publish the rules and regulations in all advertising copy about the game promotion. If the advertisements include a website, a toll-free telephone number, or a mailing address where the full rules and regulations may be viewed, heard, or obtained for the duration of the promotion, the advertising copy only has to include the material terms of the rules and regulations.⁹
- Financially back the prize pool with either a trust account or a surety bond.¹⁰
 - The trust account must be obtained through a national- or state-chartered financial institution, with a balance sufficient to pay or purchase the total value of all prizes offered. On a DACS-supplied form, an officer of the financial institution holding the trust account shall report the amount of money in the account, who established the trust account, and the name of the game promotion for which the account was established. The form must be filed within 7 days of the game promotion.
 - In lieu of the trust account, the operator may demonstrate to DACS that it has obtained a surety bond equal to the total amount of prizes offered.
 - DACS may waive this requirement if the operator has conducted game promotions in Florida for at least 5 consecutive years and has not had any criminal, civil, or administrative actions filed against him by the state related to s. 849.094, F.S.
- Furnish DACS with a certified list of the names and addresses of all persons who won prizes valued at \$25 or more, and the dates on which they won. This list must be provided to DACS within 60 days of the winners being determined. DACS must retain this list for at least 6 months before disposing of it.¹¹

The department has the authority to adopt rules to enforce the game promotion statute. Also, the department and the Department of Legal Affairs have the authority to bring action in circuit court against any operator that they have reason to believe is in violation of s. 849.094, F.S.

Violators of the provisions in s. 849.094, F.S., or the rules adopted by DACS, are guilty of a second-degree misdemeanor, punishable by a maximum 60 days in jail and a \$500 fine.¹² The department may also pursue civil

⁵ Sections 849.094(2) and (7), F.S.

⁶ Section 849.094(3), F.S.

⁷ *Id.*

⁸ Section 849.094(3), F.S.

⁹ *Id.*

¹⁰ Section 849.094(4), F.S.

¹¹ Section 849.094(5), F.S.

¹² Section 849.094(9), F.S.

penalties against violators of up to \$1,000 per violation, such as failure to post the game promotion rules or failing to maintain a surety bond in the amount of the total prize pot.

Section 849.094(10), F.S., provides that “this section does not apply” to activities or transactions regulated by the Department of Business and Professional Regulation, the activities of nonprofit organizations, or to any organization engaged in activities that do not involve the sale of consumer products or services. Also, DACS’ registration and oversight provisions do not apply to television or radio broadcasting companies licensed by the Federal Communications Commission.

When s. 849.094, F.S., was created in 1971, the Internet as we know it today did not exist, nor were computers or machines routinely used in connection with game promotions. Utilizing electronic machines as game promotions in so-called “Internet Cafes” is a relatively new occurrence in Florida. There is nothing in the statute that expressly authorizes or prohibits the use of electronic devices to aid in game promotions. Because electronic game promotions may look or function similar to slot machines, there is some uncertainty as to their legality.

Interim Report 2009-123 Overview

The Senate Committee on Regulated Industries Interim Report 2009-123: *Review of Electronic Gaming Exceptions for Adult Arcades and Game Promotions* examined the conduct of both arcade amusement machines conducted under s. 849.161, F.S., and the use of electronic game promotions under s. 849.094, F.S. The report discussed that game promotions in Florida have historically taken the form of periodically operated contests, e.g., by national fast food franchise chains¹³ and television networks.

The report discussed the history of the use of electronic game promotions noting that the first filing for an electronic game promotion was received in 2006 when DACS received a game promotion filing from a company seeking to put free-standing game promotion machines in truck stops. By November 6, 2008, there were at least 61 electronic game promotions registered with DACS.¹⁴ The report noted that several companies had begun to operate electronic game promotion games in connection with the sale of Internet time and prepaid phone cards. The report noted that local jurisdictions and other states had been struggling with an influx of Internet Cafes and had been grappling with their legality. The report found that the use of simulated gambling machines in conjunction with a game promotion has proven problematic for law enforcement for purposes of verifying that such devices are utilized to operate a game promotion rather than operate an illegal gambling device. The report indicated that law enforcement was seeking clarification as to what constituted a legal game promotion. In addition, it noted that the Florida Department of Law Enforcement, several State Attorneys, and several Sheriffs considered the electronic game promotions to be illegal in violation of the slot machine provisions found in ss. 849.15, 849.16, and 551.102, F.S.

Findings and/or Conclusions

A. Methodology

In preparation of this report, the Senate professional staff reviewed and analyzed the electronic game promotion portion of the 2009 interim report, laws related to game promotions, local ordinances related to game promotions, relevant case law, and related laws in other states. Senate professional staff discussed the issue of game promotion regulation with local governments to determine whether they have or are considering regulating or restricting the operation of game promotions. Senate professional staff sent surveys, with the assistance of the respective associations, to Florida Sheriffs, State Attorneys, and Chiefs of Police. In addition, Senate professional staff met with or conducted interviews of representatives from the Department of Agriculture and Consumer Services, industry experts, representatives from the Internet Cafe industry, and other interested persons.

¹³ An example of a national game promotion by a fast food restaurant is the McDonald’s Monopoly sweepstakes.

¹⁴ According to the numbers provided by DACS. The number of registered sweepstakes changes daily as new sweepstakes begin and old sweepstakes end.

B. How Electronic Game Promotions Operate

According to representatives of four of the largest companies or organizations that provide the game software, the bundled software and computers, or operate an Internet Cafe, the following is an example of how some electronic game promotions conducted at an Internet Cafe work:

A customer enters an Internet Cafe and purchases a long-distance calling card or Internet time, and receives the product but also a set number of game promotion entries.¹⁵ In one game promotion, for example, a customer who purchases \$10 in Internet time receives 1,000 entries into the game promotion, plus 100 free entries. A central computer server at the Internet Cafe randomly picks entries for the customer from the predetermined, finite pool of entries at the time when the customer purchases the Internet time. The calling minutes or Internet time – along with the game promotion entries – are typically associated with the customer's account at the time of purchase to allow the customer to access those entries and Internet time with an electronic card that can be swiped at any of the computers in the Internet Cafe.¹⁶

The customer can use the computer terminals to reveal the entries in an entertaining fashion or the customer can access the Internet. If the customer does not wish to reveal the entries in an entertaining fashion, the customer can ask the Internet Cafe attendant to swipe the card and tell the customer whether he or she has any winning entries. The customer also can ask the Internet Cafe attendant for a "free play" without purchasing anything, and receive a card with entries that the attendant can scan to determine if any are winners, or the customer can take the card with free entries to a computer to reveal the results in an entertaining fashion.¹⁷

Typically, the Internet Cafe customers swipe the electronic card through a card reader on the computers and select the type of game they want to play; the games are often referred to as "simulated games" because the games have no impact on the outcome of the sweepstakes. The simulated games often resemble "casino-style games" such as poker, blackjack, slots, roulette, or even arcade style games such as matching or Tetris-type games. The games are interactive but the interaction has no effect on whether the player wins or loses. Even games that appear skill based are not; the entries received by the patron are already predetermined as winners or losers. Whether the customer is a winner in the game promotion is determined prior to the customer scanning the card at the computer terminal and playing the games. Winning customers can either receive the prize in cash, or use the winnings to make an additional consumer product purchase, such as additional Internet time or phone card minutes, and thereby receive more entries into the game promotion. In any event, in electronic game promotion operations, the time spent playing the games is not deducted from the phone card or Internet time.

In 2011, Florida State University's Center for Economic Forecasting and Analysis studied the impact that Internet Cafes have on the state. The study analyzed the data supplied by Internet Cafes in Florida¹⁸ and summarized the characteristics of the average Internet Cafe. The study found that each Internet Cafe employs approximately 13 individuals, which accounts for over 4,000 to 13,000 jobs statewide. Each Internet Cafe generates between \$62,000 and \$400,000 in sales per month. Overall, these businesses generate between over \$250 million and \$750 million annually in income. A second set of survey results presented slightly lower results; overall, according to the report, both sets of data suggest that Internet Cafes produce jobs, generate a high level of income, and have a positive fiscal impact on the state.¹⁹

¹⁵ According to two industry representatives, one sells Internet time for \$6.00 per hour and the other sells phone time for 3 cents per minute.

¹⁶ The game promotion entries are not loaded on to a play card but are associated with the account for the customer so that the customer or the cashier can immediately determine if the entries are winners.

¹⁷ Section 849.094(2)(e), F.S., provides that it is unlawful for a game promotion operator to charge for entries into the sweepstakes.

¹⁸ The Florida State University did not conduct independent research but relied on self reporting from in-state Internet Cafes.

¹⁹ *The Economic Impact of Internet Cafes in Florida*, Final Report, Center for Economic Forecasting and Analysis, The Florida State University (May 2011).

C. Taxation of Internet Cafes

Normally, the daily activities of businesses generate various Florida taxes. Businesses incur sales tax on some of the items they purchase and may be required to collect sales tax when selling taxable items. Businesses may be required to pay income tax on profits. However, unique characteristics of certain Internet Cafes make it difficult to determine how these tax principles apply.

First, nonprofit organizations have become involved in the operation of Internet Cafes. For instance, some Internet Cafes are operated by veteran's organizations, which is a specific type of nonprofit organization that normally enjoys unique tax benefits. For instance, veteran's organizations are exempt from Florida sales tax on certain purchases.²⁰ And, most non-profit income is not subject to income tax – including Florida's income tax on corporations.²¹ However, the unique tax exemptions involved may not apply in certain instances, depending on whether the activity of the Internet Cafe is successfully characterized as being in furtherance of the organization's nonprofit activities.

Second, Internet Cafes sometimes argue that what they are selling is a non-taxable service. For instance, some Internet Cafes argue that they sell Internet Access Service. If so, the 1998 Internet Tax Freedom Act²² prohibits state taxation of Internet Access in order to preserve the commercial potential of the Internet. The legislation has been extended three times by the United States Congress and was last renewed on October 30, 2007 for an additional seven years.²³

However, a representative from an Internet Cafe operated by a nonprofit organization noted that all money generated by the nonprofit organization at its Internet Cafes is subject to federal income tax as business income just the same as every business. Even though the nonprofit is a 501(c) organization this income is classified as Unrelated Business Income (UBIT) and is subject to taxation at standard rates. These range from 15-39 percent of income depending on the tax bracket. The Internet Cafes file Federal Form 1120 and pay taxes on all business income, just like any other corporation.

Additionally, he stated that nonprofit organizations are required to file a Florida corporate tax return and pay the Florida corporate tax at a rate of 5.5 percent. Federal and Florida state payroll taxes, including unemployment taxes are paid for all employees. The representative also stated that the state sales tax is paid on all leases, supplies, merchandise and other items purchased for and used by the Internet Cafes. The Internet time is not subject to state sales tax pursuant to the 1998 Internet Tax Freedom Act.

In addition, the Internet Cafes are subject to all local taxes, including regulatory fees imposed by local governments.

D. Legality Concerns

Although game promotions are regulated by s. 849.094, F.S., and certain game promotions must register with the Department of Agriculture and Consumer Services, there is some question as to the legality of electronic game promotions. The department takes no position on the lawfulness of any game promotion. The department is essentially a registrar for game promotions with total prizes that exceed the \$5,000 value threshold; it does not conduct inspections or follow-up on approved registrations to ensure compliance with the law. Law enforcement and local district attorneys have raised concerns about whether the use of an electronic simulated gaming machine in a game promotion (as described above) is an illegal slot machine. Other issues have been raised concerning potential ambiguities in the game promotion statute, including whether the game promotion statute exempts nonprofit organizations from the statutory requirements in s. 849.094, F.S., or whether nonprofit organizations are excluded from conducting a game promotion entirely. In addition, the issue of consideration has been raised concerning whether customers of Internet Cafes are purchasing sweepstakes entries.

²⁰ Section 212.08(7)(n), F.S.

²¹ Rule 12C-1.022, Florida Administrative Code.

²² Pub. L. 105-277, 112 Stat. 2681-719

²³ The moratorium on Internet taxes was extended until November 1, 2014. See Pub. L. 110-108, 121 Stat. 1024-1026.

No appellate court has examined the legality of the use of electronic simulated gaming devices in conjunction with game promotions. One jury trial resulted in a not guilty verdict against the owners/operators of an Internet Cafe,²⁴ and two other cases have been brought but ultimately dismissed before trial.²⁵

Slot Machines

Chapter 849, F.S., prohibits slot machines²⁶ and gambling houses.²⁷ Slot machines are authorized at certain pari-mutuel facilities in Miami-Dade and Broward counties.²⁸ Slot machines are also permitted on tribal facilities covered by the Seminole Indian Compact.²⁹

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 any thing of value.³⁰ According to the Florida Supreme Court, the unpredictability must “be inherent in the machine.”³¹

²⁴ *State v. Crisante*, 42-2010-CF-001543-BXXXX-XX (Marion County).

²⁵ *State v. Reed*, 42-2009-CA-004574-AXXXX-XX (dismissed); 42-2010-CF-001505-AXXXX-XX (nolle prosequi) (Marion County); and *State v. Ames*, 602009CF000951XXAXFX (nolle prosequi) (Sumter County).

²⁶ Section 849.15, F.S.

²⁷ Section 849.01, F.S.

²⁸ Article X, s. 23, Florida Constitution and ch. 551, F.S.

²⁹ *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-Immokalee), Glades County (Seminole Indian Casino-Brighton), Hendry County (Seminole Indian Casino-Big Cypress), and Hillsborough County (Seminole Hard Rock Hotel & Casino-Tampa).

³⁰ Section 849.16, F.S.

³¹ *Deeb v. Stoutamire*, 53 So.2d 873, 875 (Fla. 1951).

Law enforcement and local district attorneys have raised concerns over the last several years about whether some, or even all, of the Internet Cafes in Florida are operating illegal slot machines. The 2009 Interim Report referenced raids at Internet Cafes in several counties for operating illegal slot machines and running gambling houses, and recent newspaper reports have indicated that those actions are continuing.³² Recent news articles have indicated that the operators of Internet Cafes in Pinellas County plan to sue the Sheriff for shutting down their businesses.³³

The Florida Attorney General has opined³⁴ that a machine that dispenses both a long distance phone card and a sweepstakes entry ticket is a slot machine within the meaning of s. 849.16, F.S.³⁵ The vending machine dispenses two minutes of calling time for \$1. The machine contains a cartridge that prints the results of 15,000 predetermined outcomes. The customer can instantly read the printed card to determine if he has won an amount up to \$750. Customers can also enter the sweepstakes for free. Because the receipt of a prize is dependent on some element of chance, the device is a slot machine. The Attorney General explained that the machine is a slot machine even though it accompanies the delivery of merchandise; the principal function of the device is gambling. The use of an accompanied consumer good did not safeguard the technology used as a game promotion. Instead, the Attorney General was clear that the machine was an illegal slot machine, an illegal lottery, and cannot be “disguised as a ‘game promotion.’”

Ten years later, the Florida Attorney General stated that dispensing instant bingo tickets through an electronic machine would constitute an unlawful slot machine because the machine would dispense an object that would result in the user becoming eligible for a thing of value by chance.³⁶ The machine would dispense a ticket after insertion of a piece of money, coin, or other object. The machine itself would contain no element of chance or randomness, but would merely dispense the next queued instant bingo ticket. The instant bingo ticket dispensed from the machine entitled the player to a thing of value by chance.

These interpretations of the law can be applied to the simulated gaming machines utilized for electronic game promotions. While the terminal game itself may have no impact on the outcome of the sweepstakes, the terminal is used by the patron to dispense the results of a game of chance. Opponents of Internet Cafes argue that the network of terminals’ principal function is that of a gaming machine or gambling house. State attorneys indicate that they believe the entire network of machines, including the initial point of sale terminal, function as an illegal slot machine. At some point in every transaction, the machine randomly, by chance, selects entries that entitle the player to a thing of value.

Even if the technology constitutes a slot machine, proponents of the technology insist that the authority to conduct a game promotion does not exclude the use of such technology. Section 849.094, F.S., does not explicitly permit or prohibit the use of electronic devices to aid in the operation of a sweepstakes. In contrast, such an explicit exemption for slot machine games does exist for amusement games or machines regulated by s. 849.161, F.S., which contains a safe harbor from the slot machine prohibition. The safe harbor for arcade amusement centers provides that nothing in ch. 849, F.S., shall be applicable to an arcade amusement center having “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

³² E.g. http://www.tbnweekly.com/pinellas_county/content_articles/071811_pco-01.txt (Pinellas County) and <http://www.newschief.com/article/20110816/NEWS/108165013> (Polk County). A compilation of articles surrounding Internet Cafes can be viewed at Florida Gaming Watch at: <http://www.floridagamingwatch.com/internet-cafe-news-and-information2/> (Last visited September 25, 2011).

³³ See <http://www.tampabay.com/news/publicsafety/sweeps-cafes-in-pinellas-county-vow-to-fight-shutdowns/1180821> and <http://www.tampabay.com/news/courts/internet-sweepstakes-cafe-fights-pinellas-crackdown-in-court/1191076> (Last visited September 25, 2011).

³⁴ Opinions of the Attorney General are not law and are not binding in a court of law. Instead, the opinions are advisory in nature. *Abreau v. Cobb*, 670 So. 2d 1010, 1012 (Fla. 3rd DCA 1996). “Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive.” *State v. Family Bank of Hallandale*, 623 So.2d 474, 478 (Fla.1993).

³⁵ Fla. AGO 98-07 (February 5, 1998).

³⁶ Fla. AGO 2008-35 (July 8, 2008).

merchandise only...³⁷ The exception for a retail dealer who operates a truck stop is similar.³⁸ There is not a similar safe harbor from the slot machine prohibition for game promotions in s. 849.094, F.S.

As a whole, the Internet Cafe industry claims that there are many differences between an electronic game promotion and a slot machine. The industry notes that slot machines allow line bets, use random number generators, and the element of chance is built into the machine. Slot machines have no beginning or end and each individual play on the machine is independent of the last. Game promotions on the other hand reveal results from a finite predetermined pool of outcomes. The results shown on the terminal act as a representation of the predetermined outcome and once the outcome is drawn, the ticket cannot be drawn again and the outcome is discarded. Game promotions have a predetermined start and stop date and nothing is stored on the player terminal.

In September 2011, the Florida Attorney General stated that nothing in s. 849.094, F.S., “authorizes the use of slot machines.”³⁹ In addition, the Attorney General outlined the findings in an Alabama gambling case and noted that:

a Florida court may well utilize a similar analysis in determining whether the machines utilized in Internet cafes offering customers the ability to play slot machine type games constitute slot machines and whether the elements of consideration and chance are present even though the machines may offer customers merchandise or services such as Internet or telephone access when such merchandise or services are merely incidental and chance is determined at the point of sale.⁴⁰

In 2006, the Alabama Supreme Court reviewed a simulated gaming system used as a sweepstakes for a pari-mutuel facility in Birmingham.⁴¹ The sweepstakes operated similarly to Internet Cafes in Florida. The customer opens an account, is assigned a magnetic reader, and the account is assigned a number of predetermined sweepstakes entries from a pool of entries. The customer then uses a computer terminal to reveal whether his entries have won a prize. The court found that the customers were attracted to the establishment for the purpose of gambling and that the customers are more interested in gambling than in using the Internet time.⁴² The court found that the system was an illegal slot machine and stated that “the fact that chance takes place at the point of sale rather than at the readers themselves is simply inconsequential.”⁴³

Nonprofit “Sweepstakes”

In addition to the potential slot machine implications of utilizing electronic simulated gaming terminals, the issue of how the provisions apply to nonprofit organizations has been raised over the past three years as another potential ambiguity in the game promotion statute. The issue is whether the statute provides an exception to the requirements of s. 849.094, F.S., for non-profit groups or if the statute excludes those groups from conducting game promotions.

Specifically, s. 849.094(1)(b), F.S., provides that an “operator” means “any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, *except any charitable nonprofit organization.*” (emphasis added). This provision regarding charitable nonprofit organizations was in the definition of “operator” when the game promotion statute was first enacted in 1971.⁴⁴ Section 849.094(10), F.S., further provides that the section does not apply to activities of nonprofit organizations or to any organization engaged in any enterprise other than the sale of consumer products or services. A city attorney stated that the nonprofits that are operating game promotions are doing so in violation of the game promotion statute, which prohibits nonprofits from acting as operators. Representatives from the Internet Cafe

³⁷ See s. 849.161(1)(a)1., F.S.

³⁸ See s. 849.161(1)(a)2., F.S.

³⁹ *Briefing Paper submitted to the Senate Regulated Industries Committee from the Office of the Attorney General Pam Bondi* (Sept. 2011). A copy of the paper is on file with the committee.

⁴⁰ *Id.*

⁴¹ See *Barber v. Jefferson County Racing Association*, 960 So.2d 599 (Ala. 2006).

⁴² *Id.* at 612.

⁴³ *Id.* at 615.

⁴⁴ See ch. 71-304, L.O.F.

industry stated that this provision is not a prohibition from conducting game promotions, but an exclusion from the regulatory provisions of s. 849.094, F.S.

The Florida Attorney General provided that the definition of game promotion “expressly excludes charitable nonprofit organizations” and the game promotion provisions, as a result, cannot be utilized by those entities.⁴⁵ Instead, gambling activities permitted for nonprofit organizations are typically found under s. 849.0935, F.S., pertaining to charitable drawings by chance, and s. 849.0931, F.S., pertaining to charitable bingo.

Because of the exception from the definition of an operator of a game promotion, charitable nonprofit organizations do not register the sweepstakes with the Department of Agriculture and Consumer Services and are not otherwise required to comply with the requirements of s. 849.094, F.S. However, half of the industry representatives interviewed for this report operate “sweepstakes” as nonprofit operators. The organizations indicated that they comply with the requirements in s. 849.094, F.S., as they believe the requirements are essentially good business practices. Some of the organizations, however, also noted that they were operating their businesses under s. 849.0935, F.S. This section allows for specified non-profit organizations⁴⁶ to conduct charitable drawings by chance. The nonprofit operators acknowledge that the businesses operate almost identically to the for-profit organizations; however, the software, instead of associating entries to the customer at the time of purchase, waits until the customer plays the game to draw the entries. At that point, the customer is entered into the “charitable drawing.” The operators refer to the activity as a “sweepstakes” noting that the term is not defined in statute.

Section 849.0935, F.S., permits specified nonprofit organizations to conduct drawings by chance. Section 849.0935(1)(a), F.S., defines “drawing by chance” to mean an enterprise where one or more entries are selected by chance to win a prize from entries submitted by the public. The section provides that the term “drawing” does not include those enterprises known as “‘matching,’ ‘instant winner,’ or ‘preselected sweepstakes,’ which involve the distribution of winning numbers, previously designed as such, to the public.”⁴⁷ The section references “tickets” or “entry blanks” in multiple locations and prohibits the requirement for entry fees, donations, or consideration as conditions for entry into the drawing.⁴⁸ Instead the organization may suggest a minimum donation for entry into the drawing.⁴⁹ Section 849.0935(3)(d), F.S., requires all brochures, advertisements, notices, tickets, or entry blanks to disclose the date, hour, and place where the winner will be chosen and the prizes will be awarded unless the brochures, advertisements, notices, tickets, or entry blanks are not offered to the public more than three days prior to the drawing.

In 1988, the Attorney General considered whether a matching game constituted a charitable drawing by chance.⁵⁰ The Attorney General stated that when the cards, with predetermined outcomes, were distributed to the public and matched to the outcome, the activity did not constitute a “drawing” within the meaning of the statute. The game instead is one of “‘matching,’ ‘instant winner,’ or ‘preselected sweepstakes’” which is expressly prohibited by s. 849.0935, F.S. The Attorney General provided further that the “drawing” permitted for nonprofits is one where the operator draws one or more winners from a pool of entry submissions who are then awarded a prize by chance. According to the Attorney General, a game is not permissible where the public is given a predetermined entry and the player can immediately determine if they won or lost by matching the icons on the card.

An attorney representing one of the Internet Cafe industry groups noted that neither s. 849.094 nor s. 849.0935, F.S., use the term “sweepstakes.” Section 849.094, F.S., uses the term “game promotion” and s. 849.0935, F.S., uses the term “drawing by chance.” He indicated that the term “sweepstakes” is really an industry term, not a legal term and further stated that a sweepstakes is both a game promotion and a drawing by chance and therefore

⁴⁵ *Briefing Paper*, *supra* at n. 39.

⁴⁶ Section 849.0935, F.S., defines “organization” as one “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.”

⁴⁷ Section 849.0935(1)(a), F.S.

⁴⁸ See ss. 849.0935(3)-(5), F.S.

⁴⁹ Section 849.0935(4)(b), F.S.

⁵⁰ Fla. AGO 88-07 (March 22, 1988).

permissible under both statutes. According to the industry attorney, an organization can have both a charitable sweepstakes and a promotional marketing sweepstakes. He indicated that there are many references to the concept of a charitable sweepstakes, including references by the Federal Trade Commission.

The attorney indicated that the sweepstakes is essentially a charitable sweepstakes although it incorporates many of the elements of a promotional marketing sweepstakes. He also noted that the Attorney General Opinion 88-07 “describes a pure matching game which is expressly excluded from the types of drawings by chance allowed by the statute” under s. 849.0935, F.S. He was of the opinion that if s. 849.094, F.S., “is amended to remove the charitable exclusion this would seem to be ample clarification. It would make it clear which requirements applied to charitable sweepstakes; the same as promotional marketing sweepstakes by for-profit companies.”

Consideration

A third potential legal concern has been raised concerning consideration and whether customers of Internet Cafes are purchasing sweepstakes entries. Section 849.094, F.S., acknowledges that both chance and prize are present in a game promotion. A lottery consists of three elements: prize, chance, and consideration.⁵¹ If consideration is present, the conduct could be considered an illegal lottery.

Section 849.094(1), F.S., permits a game promotion to be conducted “in connection with the sale of a consumer product or service.” Section 849.094(2)(e), F.S., prohibits the requirement of an entry fee, payment, or proof of purchase as a condition of entering a game promotion. If an individual is permitted to pay for entries into the sweepstakes, it would constitute illegal gambling as all three elements, prize, chance, and consideration would be satisfied.

The issue of consideration was raised by two State Attorneys, one county attorney, and by at least one city attorney who responded to Senate staff for this report. The attorneys found it difficult to believe that people are paying for Internet time, not using their time, and then buying more Internet time. In addition, the locations often advertise or hold themselves out as gaming centers with casino-style names and symbols, such as cherries or triple 7s on their doors. In July 2011, a Jackson County grand jury ruled that electronic gaming machines are illegal slot machines, a public nuisance, and a sham operation selling a product that nobody uses.⁵² One city attorney noted that while the game promotion operators claim to be operating like McDonald’s, the McDonald’s trash cans are not full of thrown away hamburgers and fries. Here, the attorney argued, the Internet minutes and phone card sales are purely pretextual.

In 1939, the Florida Supreme Court considered whether all three elements of a lottery were present when a theatre operated a “Bank Night.”⁵³ During the “Bank Night,” patronage to the theatre increased for both paying and nonpaying customers. The customers were eligible to sign a book from which a drawing would occur to award a prize. Both paying and nonpaying customers were entered into the drawing and could win the prize. The court, while noting that persons were not required to pay for tickets to the show to become eligible for the prize, held that all three elements of a lottery were satisfied as increased attendance to the theatre on “Bank Nights” constitutes consideration. Because of this ruling, a game promotion or sweepstakes constituted an unlawful lottery prior to the passage of s. 849.094, F.S.

During the January 2011 Seminole County Commission meeting, some members of the public testified that they visit the Internet Cafes for the games, not for the Internet.⁵⁴ On multiple occasions, the chairwoman reminded the

⁵¹ The Florida Supreme Court has noted that not every scheme that involves prize, chance, and consideration is a lottery and recognized the Legislature’s inherent power to regulate or prohibit all other forms of gambling. *See Lee v. City of Miami*, 163 So. 486, 490 (Fla. 1935). The Court has narrowed the constitutional prohibition against lotteries to those that “infest the whole community.” *Id.* Because the word “lottery” has several meanings, the Legislature can authorize certain gambling activities thereby partially defining the term “lottery” to exclude those activities. *See Greater Loretta Improvement Ass’n v. State*, 234 So.2d 665 (Fla. 1970).

⁵² A copy of the 4-page grand jury presentment is on file with the committee.

⁵³ *Little River Theatre Corp. v. State*, 135 Fla. 854, 185 So. 855 (Fla. 1939).

⁵⁴ A recording of the Seminole County Commission meeting can be viewed at: <http://seminolecounty.legistar.com/Video.aspx?Mode=Auto&URL=bW1zOi8vc3RyZWZtaW5nLnNlbWlub2x1Y291bnR5Z>

person testifying that the ordinance would not shut down the Internet Cafes, but merely would prohibit the electronic simulated gaming devices. The consensus from the customers and from the owners of these establishments is that they would shut down without the electronic simulated gaming devices.

In a 2001 Texas Court of Appeals case, the court, when discussing the element of consideration, found that a game promotion was an attempt to legalize illegal gambling and not a promotion to increase the sale of the consumer good.⁵⁵ In 2011, a Mississippi Court of Appeals used a similar analysis when considering the element of consideration; the court found that the element of consideration was established when the customers of an Internet Cafe “were purchasing prepaid telephone cards to play the computer terminals rather than to make telephone calls.”⁵⁶

In 2005, a North Carolina Court of Appeals addressed the issue of telephone calling card sales and promotional sweepstakes.⁵⁷ The court held that when the phone card was sold for one of the best long-distance rates in the country, the customer was purchasing a valuable consumer good. Because the good had value, it was reasonable to conclude that the calling card was being purchased, and not the chance for a prize. The sale of the cards was determined to not be “a mere subterfuge to engage in an illegal lottery scheme.”⁵⁸ Sweepstake proponents argue that the customer is purchasing a consumer good for fair market value and regardless of whether the good or service is being utilized, the customer is not paying for entries into the sweepstakes.

E. Survey Results

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.

F. Local Response to Electronic Game Promotion Growth

In the three years since the publication of *Interim Report 2009-123*, the number of businesses operating Internet Cafes has increased significantly according to local governments and industry representatives. There is no official estimate for how many Internet Cafes exist in the state but representatives of the industry estimate that there are somewhere between 450 to 1,000 Internet Cafes in Florida. According to a representative from DACS, there are eight electronic sweepstakes currently registered as of September 2011. Charities do not register with DACS except to register their non-profit status; electronic game promotions with total prize pools under \$5,000 are not required to register. In addition, DACS staff indicated that DACS does not inspect the locations to ensure that they are registered and compliant and has no estimate of the total number of electronic sweepstakes currently conducted in the state.

mwuZ292L21lZGhlL21lZGhlL0JDQyAwMS0xMS0xMS8wMS0xMS0xMS53bXY%3D#.Th3ufbUGzfQ.gmail (Last visited September 14, 2011).

⁵⁵ *Jester v. State*, 64 S.W.3d 553 (Tex. App. 2001) (affirming the trial judge’s holding and finding the defendant guilty of five counts of misdemeanor gambling even though the defendant presented testimony that the sweepstakes was intended to promote the sale of phone cards and that some patrons did in fact use the phone cards).

⁵⁶ *Moore v. Mississippi Gaming Commission*, 64 So.3d 537, 541 (Miss. Ct. App. 2011).

⁵⁷ *American Treasures Inc. v. State*, 617 S.E.2d 346 (N.C. App. 2005).

⁵⁸ *Id.* at 351.

Local governments are responding to these establishments differently; in some counties, Sheriffs are making arrests, while other counties are formulating regulatory schemes. In response to the increase in the number of Internet Cafes and concerns expressed by constituents, many local jurisdictions have or are considering enacting ordinances or moratoriums to slow the growth of Internet Cafes, regulate, or prohibit the establishments. The moratoriums are designed to give the local commissions time to study the issue. According to survey results, only two counties have moved to regulate Internet Cafes: Leon and Duval.

Duval passed the first ordinance regulating Internet Cafes in October 2010. The ordinance limits the number of locations, regulates, and taxes the games.⁵⁹ The ordinance allows facilities that were operating as of August 2010, to receive a permit but thereafter caps the number of permits to 20 for the county. The ordinance requires independent laboratory certification that confirms the software used to run the sweepstakes complies with state and local laws. Operators must also submit a \$500 application fee and permit fees for the location and per device. Signage requirements limit the advertisement of the facility to the goods or service sold, plus the operator may advertise that a sweepstakes is being offered. The signage may not suggest gambling is occurring inside or display images associated with slot machine graphics. In addition, the operator must maintain a bond in the amount of the total announced value of all prizes or \$50,000, whichever is less. Armed security guards are also required during nighttime operating hours.

In contrast to the regulatory ordinance, Seminole County passed an ordinance to ban all simulated gambling devices in January 2011,⁶⁰ which is currently being challenged in federal court as an unconstitutional limitation on free speech.⁶¹ The ordinance defines a “simulated gambling device” as “any device that, upon connection with an object, is available to play or operate a computer simulation of any game, and which may deliver or entitle the person or persons playing or operating the device to a payoff.” The case is currently on appeal to the United States Court of Appeals, 11th Circuit. The City of Winter Garden⁶² and Baker County⁶³ have also passed ordinances to prohibit the use of simulated gaming displays used commonly in Internet Cafes.

In an ordinance similar to the Duval ordinance, Leon County earlier this year passed a regulatory ordinance. Starting in September 2011, an applicant for a “Simulated gambling facility” must submit fingerprint cards, a criminal background check certification letter, rules and regulations for the game promotion, certification by an independent testing laboratory, and proof of trust account or copy of bond for an amount equal to the total value of announced prizes or \$50,000, whichever is less. The applicant must also submit information about all owners and affiliates of the applicant and a list of all products and services sold, including the sales price for each item, which must be reasonable market value. The application must be accompanied by a \$500 application fee and an annual permit fee that is determined per device used in the establishment. The permit fee ranges from \$2,500 (1-20 devices) to \$12,500 (81-100 devices). In addition, each applicant must submit an additional \$50 per device for the annual simulated gambling device inspection fee.

⁵⁹ Duval County Ordinance 2010-326 was codified as ch. 156, and can be found at: <http://www.coj.net/Departments/Environmental-and-Compliance/Docs/Chapter-156-Electronic-Game-Promotions.aspx> (Last visited September 9, 2011).

⁶⁰ Seminole County Ordinance 2011-1, available at: http://www.seminolecountyfl.gov/ca/pdf/Ordinance_2011-1.pdf (Last visited September 9, 2011).

⁶¹ *Allied Veterans of the World v. Seminole County*, case 6:11-cv-155-Orl-28DAB (M.D. Fla. 2011). In February 2011, a temporary restraining order was issued to enjoin Seminole County from enforcing the ordinance, available at: <http://www.leoncountyfl.gov/ADMIN/Agenda/attach/110222/A2102.pdf> (Last visited September 9, 2011). In May 2011, the court denied Plaintiff’s motion for a preliminary injunction and ordered that the temporary restraining order was no longer in effect. Seminole County is entitled to enforce the ordinance. In September 2011, the court denied Plaintiff’s motion to stay trial court proceedings pending its appeal to the U.S. Court of Appeals for the 11th Circuit.

⁶² A copy of the ordinance can be viewed at: <http://www.cwgdn.com/files/city-clerk/ordinances/Ord%2011-03%20Prohibiting%20Commercial%20Gaming%20Devices.pdf> (Last visited September 15, 2011).

⁶³ A copy of the ordinance can be viewed at: <http://www.ordinancewatch.com/files/LocalGovernment/LocalGovernment54345.pdf> (Last visited September 9, 2011).

Along with Sheriffs, State Attorneys, and Chiefs of Police, it has been reported that the Commissioner of the Department of Agriculture and Consumer Services recommends clarification on the issue because it is leading to uneven enforcement across the state.⁶⁴

G. Actions by Other States

Other states are also grappling with how to treat the influx of Internet Cafes. Below are examples of how some states are addressing the issue.

In 2006, North Carolina banned the use of video poker machines. Shortly thereafter, North Carolina saw an increase in Internet Cafes in the state,⁶⁵ which reached approximately 900 locations.⁶⁶ In 2008, the North Carolina Legislature attempted to expand the prohibition that applied to video poker machines to include any game that involved the random chance matching of symbols. Despite the attempt to close the loophole, Internet Cafes continued to operate in North Carolina because the customers were purchasing a product, receiving free entries, and the simulated game did not involve any chance or matching; the outcome of the game was predetermined.⁶⁷ In 2010, the North Carolina Legislature passed a statute that prohibited the promotion, operation, or conduct of a server-based electronic game promotion.⁶⁸ The prohibition provides that it is unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine or a video gaming machine for the purpose of promoting, operating, or conducting a server-based electronic game promotion. The statutes define “electronic machine or device” as a machine or device that is in the possession of a sweepstakes sponsor that is intended to be used by a sweepstakes entrant and is capable of displaying information on a screen.⁶⁹ The statutes expressly provide that it is unlawful to conduct a sweepstakes using an electronic machine or device with an entertaining display, including the entry process or to reveal the prize, or to promote a sweepstakes with an electronic machine that is conducted with an entertaining display.⁷⁰

During the recent legislative session, the Virginia Legislature amended the definition of illegal gambling, to attempt to address game promotions conducted similar to Internet Cafes. The legislation defined “illegal gambling” and specified that it included the purchase of a product, Internet access, or other thing of value if the purchaser is credited with free points that may be redeemed for money and the purchase of the product, Internet access, or other thing of value would be insufficient value in and of itself to justify the purchase or is merely incidental to the chance to win money.⁷¹

In contrast to the legislation above, Massachusetts Attorney General Coakley issued a permanent regulation to ban Internet Cafes in June 2011. “The regulation makes it clear that companies cannot skirt our laws by disguising gambling as something else, such as the sale of internet access. Though the businesses purport to sell goods or services, such as internet access or phone cards, the Attorney General’s investigation found those sales were a pretext for unlawful lotteries, online slot parlors, sweepstakes and similar gambling. The regulation makes clear that these practices are against the law.”⁷²

Other states are also considering the adoption of legislation to deal with Internet Cafes. For example, the Georgia Governor, Georgia State Attorney, and Georgia law enforcement want to prohibit Internet Cafes. In recent news,

⁶⁴ <http://saintpetersblog.com/2011/05/adam-putnam-internet-cafe-laws-need-clarity/> (Last visited September 14, 2011).

⁶⁵ Denning & Yearwood, *Internet Sweepstakes Cafes: A Survey of Law Enforcement Perceptions*, Governor’s Crime Commission, North Carolina (2010); a copy of the report can be viewed at: http://www.ncgccd.org/pdfs/internet_cafe.pdf (Last visited September 16, 2011).

⁶⁶ See <http://www.vendingtimes.com/ME2/dirmod.asp?sid=EB79A487112B48A296B38C81345C8C7F&nm=Vending+Features&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=BCABF11D27AC44C8AD6295593E00CA82> (Last visited September 16, 2011).

⁶⁷ *Supra* at n. 60.

⁶⁸ N.C. Gen. Stat. s. 14-306.3.

⁶⁹ N.C. Gen. Stat. s. 14-306.4(a)(1).

⁷⁰ N.C. Gen. Stat. s. 14-306.4(b).

⁷¹ VA Code s. 18.2-352.

⁷² http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2011_06_24_final_cafe_regs&csid=Cago (Last visited September 12, 2011).

it was noted that one Internet Cafe wanted to expand to 500 terminals. The Georgia State Attorney was quoted as saying that the Internet Cafe industry is trying to skirt the law and “intimidate prosecutors with complicated legal interpretations of existing law...”⁷³

H. 2011 Legislative Session – Florida

Three bills were introduced during the 2011 Regular Session concerning electronic game promotions. Senate Bill 222 by Senator Fasano proposed to require each operator of an electronic-based game promotion that offers prizes with an announced value over \$1 to register with DACS, purchase a surety bond or maintain a prize escrow account, post its rules, and meet other statutory requirements. In contrast, SB 576 by Senator Oelrich and CS/HB 217 by Representative Plakon proposed to ban all electronic game promotions. Representative Plakon’s bill was heard by the House Business and Consumer Affairs Subcommittee on March 22, 2011 and passed by a vote of 10-5. The bill died in the House Appropriations Committee. None of the bills were heard in the Senate.

For the 2012 Regular Session, Representative Plakon has filed HB 3, which is similar to the bill he sponsored during the 2011 Regular Session. The bill creates the “Simulated Gambling Prohibition and Community Protection Act,” which prohibits the use of mechanically or electronically operated game promotions, raffles, drawings, or games of chance. Any violation of the act is a felony of the third degree.⁷⁴ Senator Diaz de la Portilla has filed SB 380, which imposes additional regulations for electronic game promotions. The bill requires the operator of any game promotion that supplies electronic devices or computer terminals to reveal or display the results of a game promotion with a total prize valued over \$1 to register with DACS, maintain a bond, obtain independent laboratory certification that the game promotion complies with certain requirements, and pay a \$100 per terminal filing fee. The bill provides that local governments may adopt ordinances to limit or regulate electronic game promotions, including, but not limited to, permitting, fees, fines, location, signage, security, or other enforcement provisions. The bill permits charitable nonprofit organizations to conduct a game promotion.

I. Perspectives from the Industry

This section discusses proposals from representatives of Internet Cafes or sweepstakes businesses with regard to changes to s. 849.094, F.S. The members of the industry, as a whole, appear to support legislative changes that can provide more legitimacy to their businesses and promotions. Currently, as discussed above, each local jurisdiction is handling the issue separately; industry representatives appear to be in agreement that clarification on a state level is necessary to avoid legal challenges. Although the suggestions are slightly different, most of the industry representatives want to see testing of the sweepstakes software to ensure compliance with the statute, registration fees paid per device or terminal used, and bonding on all electronic sweepstakes. Below are five perspectives from industry representatives.

An operator of a nonprofit organization suggested regulation for every operator of a game promotion that provides electronic devices or computer terminals with video display monitors to reveal or display the results of a game promotion offering a total prize amount of more than \$1.00. The operator suggested that such organizations must register with DACS, pay a \$100 per device annual fee, and be required to obtain a bond at least 7 days prior to the commencement of the game promotion in an amount equivalent to the total value of all prizes offered. The operator suggested that operators of electronic game promotions should be required to file with DACS a certification from an independent testing laboratory that such game promotion software:

- Operates only games with a preconfigured finite pool of entries;
- Provides an entrant with the ability to participate in the absence of a purchase;
- Does not distinguish an entrant who has made a purchase from one who has not, with respect to all advertised prizes; and
- Utilizes video displays that do not determine the result.

⁷³ <http://www.ajc.com/news/georgia-politics-elections/deal-state-leaders-vow-1120234.html> (Last visited September 12, 2011).

⁷⁴ A third degree felony is punishable by a term of imprisonment not to exceed five years and a fine not to exceed \$5,000. Sections 775.082(3)(d) and 775.083(1)(c), F.S.

The operator noted that legislation to clarify that nonprofits can engage in game promotions and utilize electronic devices could avoid litigation across the state. The operator further suggested that, at a minimum, clarification on the legality of these devices should be done at the state level and the other issues, such as permitting, fees, location, signage, security, etc., could be left to the local jurisdictions to regulate.

A second operator believed that Internet Cafes should be taxed at 4 percent (the same rate as coin operated amusement machines), provide a certification from an independent laboratory, and provide a bond. The operator also believed that counties should be allowed to reasonably restrict the establishments as to time, manner, and location in their areas.

A third operator suggested either a statewide moratorium or a population-based limitation on the number of Internet Cafes in each geographic area. The operator believed that all game promotions should be required to register with DACS regardless of the prize amounts or electronic status. The operator wanted to have a requirement that only a legitimate good or service be associated with a game promotion. The operator suggested the necessity for independent laboratory confirmation that no random number generator is being used and that the sweepstakes has a finite set of entries. The operator believed that there should be both a filing fee per machine of approximately \$100-\$150 per machine per year and some tax collected from the proceeds of the entities, especially because some of the entities sell a non-taxed good. The operator believed that advertising should be regulated to prohibit misleading advertising such as the use of cherries on the building and that the number of terminals that may be used should be limited to 30 terminals. The operator, like the others, wanted to have state statutory action instead of local action. The operator also wanted to have heightened criminal penalties to a 3rd degree felony for violations of the game promotion statutes.

A software operator indicated that the game promotion statute needs clarification, not solely on the issue of the use of electronic sweepstakes, to ensure that sweepstakes are being conducted properly. The operator suggested revisions to s. 849.094, F.S., that require each game promotion to operate off of a single finite pool of entries; all participants, regardless of how they enter the sweepstakes, should be entered into the same pool. The operator believed that the statute should clarify that all sweepstakes entries must be dispensed before a new, separate sweepstakes may begin. The operator noted that some sweepstakes are currently operating with multiple pools, which may not provide equal opportunity to win to the free entries as they may not be eligible to enter every pool/game title. The operator wanted to have language in the statute that provides that the game theme and play level of a game cannot dictate the pool the customer enters.⁷⁵

The software operator noted that some software companies will create programs that either don't make all prizes available to all participants or do not award all of the prizes. For example, he indicated that it is common for some sweepstakes to create a unique prize pool for every play level of every game. When this occurs, the pools of prizes for each prize pool are only accessible when a player selects a specific game and specific play level. Free entry customers cannot play at certain play levels in this scenario because they do not have enough sweepstakes points to wager. In this example, the entrants in the sweepstakes are not given equal dignity to the other participants. He noted that another example of a software problem exists if the company uses a single sweepstakes pool but allows the game to control the outcome. In this example, the game plays and determines the results and then looks to the prize pool for the result closest to what is displayed on the computer screen. Once more than 50 percent of the prize pool has been depleted, the entries are eliminated and a new sweepstakes begins. When this happens, not all prizes are awarded and it violates the game promotion provisions in the statutes.

As a result of these two common game promotion concerns, the software operator recommended that all programs be designed so that all participants, paying or non-paying, are treated with equal dignity. To do this, the operator recommended a single finite pool of prizes that must be completely depleted prior to commencing another sweepstakes. The operator also suggested limiting the pool size - 1,000,000 entries were suggested as the

⁷⁵ The operator suggests that if the game or game level dictates the pool of entries the customer is entered in, the customer is paying for play and gambling outside the "sweepstakes" exception. The operator further states that some of the current sweepstakes operations are operating with multiple pools and are allowing the game to generate the result where the game result looks to the pool to find a match.

maximum size. In addition, the software operator agreed that independent lab certification is needed for all electronic sweepstakes programs to ensure that the software is compliant with statutory requirements.

In summary, the software operator recommended the following 10 requirements for electronic sweepstakes:

- All games in a single location be operated from a single finite pool of results;
- The single finite pool of results shall reside on the server for the location, not on the game;
- The single finite pool of results must be on-site and not at a remote server or data center;
- The results shall be drawn from the single finite pool at the time of purchase or donation, prior to playing the games;
- Free entries must be drawn from the same pool used for paying participants and in the same manner;
- The finite pool of results must be completely depleted by participants prior to generating a new pool;
- The maximum pool size per location should be limited to 1,000,000 entries;
- Only prizes contained in the pool shall be advertised and awarded;
- Changing the play level on the games shall not change the prizes available or the prizes awarded; and
- No additional promotional play may be awarded to paying customers unless non-paying participants are provided the same opportunity.

A gaming law professor agreed that s. 849.094, F.S., needs to be addressed. The professor recommended more standards for the operation of game promotions. Specifically, the professor recommended that the results of the game promotion must be predetermined and that the predetermined outcome cannot be changed by the game selected. The professor recommended a statutory minimum payout percentage and taxation on the proceeds of the games. He suggested that entries be required to be a printed ticket, a limitation on the number of promotions or drawings that each operator may conduct, a limitation that the products sold be tangible personal property, and that any violations of the statutes be an unfair trade practice under ch. 501, F.S. With regards to electronic game promotions, the professor considered the ability of the player to pay to play again on the terminal to be one of the elements that makes the terminal a slot machine and recommended that this action be prohibited in statute. The professor recommended independent certification of the software and standards for the operation of an electronic game promotion to ensure the certification is tested to Florida specific requirements.

Options and/or Recommendations

Based upon the findings in this report, Senate professional staff recommends that the Legislature not maintain the status quo. Local governments are passing inconsistent ordinances and law enforcement is similarly handling these businesses differently across the state. In some jurisdictions, law enforcement is being sued after attempting to close these businesses as illegal gambling establishments. Clarification is needed to address whether electronic game promotions are permissible under s. 849.094, F.S., or electronic drawings by chance are permissible under s. 849.0935, F.S.

If the Legislature chooses to regulate or prohibit the use of electronic game promotions for for-profit businesses, the Legislature may wish to clarify whether the nonprofit businesses may continue to operate Internet Cafes. Section 849.094, F.S., can be amended to clarify whether nonprofit organizations can engage in game promotions in conjunction with the sale of a consumer good. In addition, s. 849.0935, F.S., can be amended to clarify whether a charitable drawing by chance can use an electronic device and be conducted through the use of simulated gaming terminals.

The Legislature may also choose to impose more stringent restrictions upon the conduct of traditional, non-electronic-based, drawings by chance and game promotions, as noted in the report.

Because of inconsistent enforcement, regulation, and vagueness in the statute, Senate professional staff recommends clarification on the legality of the use of electronic devices for game promotions and charitable drawings by chance. Senate professional staff recommends that the Legislature consider the following actions:

If the Legislature chooses to prohibit electronic game promotions at Internet Cafes in Florida:

The Legislature could amend s. 849.094, F.S., to prohibit “server-based” electronic gaming machines in a manner similar to the legislation adopted in North Carolina. If the purpose is to prohibit all Internet Cafes, the amended statute and prohibition must also prohibit the use of electronic devices for charitable drawings by chance found in s. 849.0935, F.S. Law enforcement and State Attorneys support HB 3 from Representative Plakon, introduced for the 2012 Legislative Session, which seeks to prohibit all types of electronic “sweepstakes.”

If the Legislature chooses to regulate electronic game promotions at Internet Cafes in Florida:

The Legislature could amend s. 849.094, F.S., to regulate electronic game promotions and to provide for the testing of the computer source code used by these establishments to ensure compliance with the game promotion requirements of s. 849.094, F.S. The companies utilizing electronic gaming terminals support amendments to clarify the legality of these machines. Suggested amendments to the statute include a bond requirement for all electronic game promotions, a per terminal registration, and the Legislature could consider the following provisions or requirements:

- Establish fees to support regulation, including fees per terminal and location;
- Prohibit progressive prize pools;
- Limit operators to a single prize pool;
- Require that the game promotion be exhausted prior to the start of another game promotion;
- Limit the game promotion entries to a maximum of 1,000,000;
- Clarify whether nonprofit organizations may conduct a game promotion coupled with clarification to s. 849.0935, F.S., pertaining to drawings by chance;
- Provide a safe harbor from the slot machine prohibition;
- Prohibit operators from using casino-style graphics to advertise any game promotion; and
- Prohibit game terminals from being used to purchase any consumer good or be used to dispense change or pay winnings.