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## SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 31, 1998 Revised: \_\_\_\_\_

Subject: Game Promotions

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Maclure</u>	<u>Austin</u>	<u>CM</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

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### I. Summary:

This committee substitute revises the statutory requirements governing game promotions used in connection with the sale of consumer goods and services, by specifically including sweepstakes within the statute's coverage and by providing for increased criminal and civil penalties when a game promotion operator commits an unlawful practice against a person who is 60 years of age or older. The committee substitute declares it unlawful to send game promotion advertising and promotional material to a person who has requested not to receive such materials, and it establishes some content and format standards governing certain game promotion materials.

This committee substitute substantially amends section 849.094, Florida Statutes.

### II. Present Situation:

#### Deceptive & Unfair Trade Practices

Part II of ch. 501, F.S., is the "Florida Deceptive and Unfair Trade Practices Act," one of the stated purposes of which is to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce" (s. 501.202(2), F.S.). The act declares that such acts or practices are unlawful (s. 501.204(1), F.S.). The statute authorizes the Department of Legal Affairs and the office of the state attorney to bring: 1) an action to obtain a declaratory judgment that an act or practice violates the statute, 2) an action to enjoin violators, or 3) an action on behalf of one or more consumers for the actual damages caused by an act or practice in violation of the act (s. 501.207(1), F.S.). A willful violator of the Deceptive and Unfair Trade Practices Act is liable for a civil penalty not exceeding \$10,000 for each violation (s. 501.2075, F.S.). However, when a violator of the act willfully engages in a practice that

victimizes or attempts to victimize a senior citizen or a handicapped person, and the violator knew or should have known that the practice was unfair or deceptive, the civil penalty may not exceed \$15,000 for each violation (s. 501.2077(2), F.S.).

### **False, Misleading, and Deceptive Advertising**

Section 817.41(1), F.S., provides that it is unlawful for any person to make or disseminate any misleading advertisement. Misleading advertising includes statements that are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue and misleading and that are made in order to sell or dispose of property or services, or to induce the public to enter into any obligation relating to such property or services (s. 817.40(5), F.S.). A person who prevails in a civil action for violation of the misleading advertising statute is entitled to costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages (s. 817.41(6), F.S.).

### **Game Promotion/Sale of Consumer Products or Services**

A game promotion is defined by statute as a contest, game of chance, or gift enterprise, conducted in connection with the sale of consumer products or services, in which the elements of chance and prize are present (s. 849.094(1)(a), F.S.). Under s. 849.094, F.S., it is unlawful for a person, business, or association promoting, operating, or conducting a game promotion to:

- Design or conduct a game promotion, in connection with the promotion of consumer products or services, in which the winner may be predetermined or the game may be manipulated in order to allocate a winning game to certain lessees, agents, or franchises; or to allocate a winning game to a particular geographic area or to a particular period of the game promotion;
- Arbitrarily remove, disqualify, disallow, or reject any entry;
- Fail to award prizes offered;
- Print or circulate false, deceptive, or misleading advertising materials in connection with the game promotion; or
- Require an entry fee, payment, or proof of purchase as a condition of entering a game promotion (s. 849.094(2), F.S.).

The statute requires an operator of a game promotion for which the total announced value of prizes offered exceeds \$5,000 to file with the Department of State a copy of the game promotion rules and regulations and a list of the prizes offered at least 7 days before the start of the game promotion. Once filed, the rules may not be changed (s. 849.094(3), F.S.). In addition, such an operator must establish a trust account with a sufficient balance to pay or purchase the total value of all prizes, or obtain a surety bond in an equivalent amount. However, the department may waive the trust-account or surety-bond requirement in the case of an operator who has conducted game promotions in Florida for at least 5 consecutive years and who has not had any civil, criminal, or administrative action instituted against the operator by the state for violation of the game promotion statute during that 5-year period (s. 849.094(4), F.S.). Additionally, an operator

of a game promotion for which the total announced value of prizes offered exceeds \$5,000 must provide the department with a certified list of the names and addresses of persons who have won prizes with a value in excess of \$25. The operator must provide a list of winners, without charge, to any person who requests it. As an alternative, the operator may publish the same winner information in a Florida newspaper of general circulation within 60 days after such winners have been determined and must provide to the department a certified copy of the publication (s. 849.094(5), F.S.).

### **Attorney General's Action Against Sweepstakes Operator**

In February 1998 the Office of the Attorney General filed a civil action against American Family Publishers and its celebrity spokesmen, alleging that the company engaged in deceptive tactics as part of a mail campaign promoting magazine subscriptions and a sweepstakes. In such mailings, American Family and other companies operating sweepstakes have included statements that may appear to declare an individual a winner, but that are preceded by disclaimer language in a smaller type size specifying, for example, that the individual must actually hold the winning entry and return that entry within a specified period of time in order to receive the prize.

The Florida attorney general's action was filed under the state's Deceptive and Unfair Trade Practices Act and under the game promotion statute. Among the allegations made by the attorney general are that the company falsely suggested that a recipient must purchase a magazine subscription in order to win a grand prize, falsely suggested that the mailing recipient is one of a select group vying for a prize, falsely suggested that a recipient need only respond within a specified number of days and before an alternate winner responds in order to claim the grand prize, and required a more cumbersome entry process for individuals who do not wish to purchase magazine subscriptions. According to the attorney general's office and newspaper accounts, some customers responded to the solicitations by traveling to Tampa, which is American Family Publisher's mailing address, in an attempt to collect prizes they thought they had won.

### **III. Effect of Proposed Changes:**

This committee substitute amends s. 849.094, F.S., governing game promotions used in connection with the sale of consumer products or services. The committee substitute:

- Includes sweepstakes within the definition of a "game promotion," and specifies that the statute applies to game promotions conducted in Florida or offered to Florida residents in connection with the promotion or advertisement of a consumer product or service, in addition to such promotions offered in connection with the sale of a consumer product or service. The measure specifies that the term includes, but is not limited to, enterprises commonly known as "matching," "instant winner," or "preselected sweepstakes" that involve the distribution of winning numbers or game pieces designated as such in the game promotion rules.

- Expands the definition of the term “operator,” for the purpose of the statute’s various standards and requirements, to include any entity authorized to promote, operate, or conduct a game promotion, in addition to persons or organizations who directly do so. The measure also defines the term “older individual” to mean a person who is 60 years of age or older.
- Declares it unlawful for an operator to: 1) send game promotion advertising and promotional material to a person or any guardian or agent who has requested that his or her name be deleted from such distribution, or 2) use more than one type size, color of print, or type style within the same sentence or clause in a letter or on an envelope, regarding the likelihood of winning a prize. An operator must process within 60 days a request to have a person’s name deleted from a game promotion distribution. The committee substitute specifies that these new provisions do not apply to timeshare prize and gift promotional offers defined in s. 721.111, F.S.
- Requires the operator of a game promotion in which the total announced value of prizes offered is more than \$5,000 to publish the applicable rules and regulations in all game promotion materials mailed to the public.
- Requires the following information be printed, in 12-point type or larger, on the outside of an envelope used with a game promotion in which the total announced value of prizes offered is more than \$5,000: 1) the odds of winning the prize if that prize is referenced on the envelope; 2) the physical address of the operator; and 3) the toll-free number for the Department of State, along with a statement directing individuals to call the number if they have questions about the prizes or whether the operator is registered with the department.
- Prescribes that game promotion materials must indicate if the operator of a game promotion with a total announced value of prizes exceeding \$5,000 intends to exercise the statutory option of announcing certain prize winners through an advertisement placed in a Florida newspaper of general circulation, as an alternative to distributing copies upon demand of a winners list filed with the Department of State.
- Establishes that a violation of the statute or rules governing game promotion constitutes a first-degree misdemeanor when such violations are committed against a person who is 60 years of age or older. The committee substitute retains the current second-degree misdemeanor standard for violations committed against other persons.
- Authorizes a civil penalty up to \$5,000 for each violation of the statute or rules committed against a person who is 60 years of age or older. The committee substitute retains the current \$1,000 civil penalty standard for violations committed against other persons.
- Clarifies that the Department of State’s rule-making authority relating to game promotions is pursuant to specified provisions of the Administrative Procedure Act.

The committee substitute provides an effective date of October 1, 1998.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The committee substitute's proposed regulation of printed materials distributed in connection with a game promotion may raise constitutional free speech questions. Such materials would constitute commercial free speech. The U.S. Supreme Court has said that commercial free speech enjoys constitutional protection if it concerns lawful activity and is not misleading. Protected commercial free speech, however, may nonetheless be regulated if: 1) there is a substantial governmental interest in the regulation, 2) the regulation directly advances the governmental interest, and 3) the regulation is a reasonable fit that is narrowly tailored to achieve the objective. (See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).) This committee substitute appears to be consistent with these constitutional standards.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Operators of game promotions that engage in unlawful practices against persons who are 60 years of age or older may be subject to more stringent criminal penalties and higher civil penalties than currently authorized in the game promotion statute. Game promotion operators will also be required to make certain disclosures or statements in certain materials distributed in connection with game promotions. To the extent such provisions discourage misleading game promotion materials, recipients of such materials will benefit. The actual economic impact of these provisions on the private sector is not known.

**C. Government Sector Impact:**

The Department of State and the Office of the Attorney General do not anticipate the need for additional resources to implement the provisions of this committee substitute.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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