

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 707 Fantasy Contests

**SPONSOR(S):** Business & Professions Subcommittee; Gaetz and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 832

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	10 Y, 3 N, As CS	Anderson	Anstead
2) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

A fantasy contest (also called a fantasy sport or fantasy game) is a type of contest where participants assemble, own, and manage imaginary teams made up of actual professional sports players. The fantasy teams compete based on the statistical performance of actual players in an actual sports game. Participants can play fantasy contests at home or online, through a servicer or with friends, with or without an entry fee, and over a full season or over a shorter period of time.

The bill creates s. 501.935, F.S., to regulate fantasy contests. The bill provides requirements for fantasy contest operators and outlines civil penalties for violations of the provisions which may be recovered through civil action brought by the Department of Agriculture and Consumer Services (DACS).

The bill defines "fantasy contest" as a fantasy or simulated game or contest where the contest participant manages and owns a fantasy or simulation sports team made up of human athletes or players that are members of an amateur or professional sports organization and that meets the following conditions:

- The membership of the fantasy or simulation sports team may not be based on the current membership of an actual team.
- The value of all prizes and awards must be established and made known in advance of the contest.
- Winning outcomes must reflect the relative knowledge and skill of the players and are determined by accumulated statistical results of the performance of human athletes.
- Winning outcomes must not be based on the score, point spread, or any performance of a sports team or solely on a single performance of an individual human athlete in a single sporting event.

The bill defines the term "fantasy contest operator" to mean a person or entity that offers fantasy contests for a cash prize to 750 or more members of the general public per year. A fantasy contest operator must register with the department to offer fantasy contests in the state and pay an initial registration fee of \$500,000 and an annual renewal fee of \$100,000. The bill requires procedures for fantasy contest operators related to age verification, restrictions on who can participate in contests, a prohibition against the sharing of confidential information, and employee training for responsible play. The bill also requires contest operators to work with and fund a compulsive or addictive behavior prevention program.

The bill provides that "fantasy contests" would be exempt from regulation under ch. 849, F.S., entitled "Gambling." It also provides that a person or entity that offers fantasy contests to fewer than 750 members of the public per year is not considered a "contest operator" and is exempt from regulation under ch. 849, F.S., and from contest operator requirements imposed in the bill.

The bill results in a significant fiscal impact on the state government. However, the revenue generated from registration fees required under the bill is estimated to exceed the cost of administration.

The bill provides an effective date of July 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background of fantasy contest industry:**

A fantasy contest (also called a fantasy sport or fantasy game) is a type of contest where participants assemble, own, and manage imaginary teams made up of actual professional sports players. The teams compete based on the statistical performance generated by the actual players in an actual sports game. The players' performances are converted into points that are compiled according to the participant's team roster. In fantasy contests, participants draft, trade, and cut players similar to a real team owner.

The online fantasy contest industry is a \$4 billion dollar industry in the United States.<sup>1</sup> Fantasy NFL football is the most popular fantasy contest and in 2015, an estimated 56.8 million people competed in fantasy contests in the United States and Canada.<sup>2</sup>

Although fantasy contests began as a contest played amongst friends or co-workers, new technology in the mid-1990s allowed for broader access to the public to pursue fantasy contests because statistics could be easily and quickly compiled online. Additionally, news and information about players was more readily available through growing access to the Internet.

Daily fantasy contests are an accelerated version of fantasy contests, which are played across a shorter period of time. For example, daily fantasy contests may be played over a single week in a season, rather than the entire season. Daily fantasy contests are typically played as "contests" which require an entry fee. The fee funds an advertised prize pool from which the servicer takes a rake-off as revenue.<sup>3</sup>

The legality of daily fantasy contests has been challenged nationwide with critics arguing that the contests more closely resemble proposition wagering on athlete performance than traditional fantasy contests.

#### **Current situation:**

In general, gambling is illegal in Florida.<sup>4</sup> Chapter 849, F.S., prohibits keeping a gambling house,<sup>5</sup> running a lottery,<sup>6</sup> or the manufacture, sale, lease, play, or possession of slot machines.<sup>7</sup> Certain exceptions have been authorized, with restrictions on permitted locations, operators, and prizes, including penny-ante games,<sup>8</sup> bingo,<sup>9</sup> cardrooms,<sup>10</sup> charitable drawings,<sup>11</sup> game promotions (sweepstakes),<sup>12</sup> and bowling tournaments.<sup>13</sup>

In 2013, the Legislature clarified that Internet café style gambling machines were illegal in the state. The legislation clarified existing sections of law regarding slot machines, charitable drawings, game

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<sup>1</sup> FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.org/about> (last visited January 8, 2016).

<sup>2</sup> FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.org/research/industry-demographics/> (last visited January 8, 2016).

<sup>3</sup> THE WASHINGTON POST, *Daily fantasy sports Web sites find riches in Internet gaming law loophole*, [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html) (last visited January 8, 2016).

<sup>4</sup> s. 849.08, F.S.

<sup>5</sup> s. 849.01, F.S.

<sup>6</sup> s. 849.09, F.S.

<sup>7</sup> s. 849.16, F.S.

<sup>8</sup> s. 849.085, F.S.

<sup>9</sup> s. 849.0931, F.S.

<sup>10</sup> s. 849.086, F.S.

<sup>11</sup> s. 849.0935, F.S.

<sup>12</sup> s. 849.094, F.S., authorizes game promotions in connection with the sale of consumer products or services.

<sup>13</sup> s. 546.10, F.S.

promotions, and amusement machines and created a rebuttable presumption that machines used to simulate casino-style games in schemes involving consideration and prize are prohibited slot machines.<sup>14</sup>

In 2015, the Legislature determined that the regulation of the operation of skill-based amusement games and machines would ensure compliance with Florida law and prevent the expansion of casino-style gambling. The Legislature clarified the operation and use of amusement games or machines to ensure that regulations would not be interpreted as creating an exception to the state's general prohibitions against gambling.<sup>15</sup>

### *Lotteries*

Lotteries are prohibited by the Florida Constitution.<sup>16</sup> The constitutional prohibition is codified in statute at s. 849.09, F.S. Other than the statement in the Florida Constitution that indicates that the term "lottery" does not include "types of pari-mutuel pools authorized by law as of the effective date of this constitution," the term "lottery" is not defined by the Florida Constitution or statute. Generally, a lottery is a scheme which contains three elements: consideration, chance, and prize. As to consideration, while most states view consideration narrowly as a tangible asset, such as money, Florida views consideration broadly, as the conferring of any benefit.<sup>17</sup> Thus, even if players do not pay to participate in a game where they have a chance to win a prize, it may be an illegal lottery.

In 1986, Florida voters approved an amendment to the Florida Constitution to allow the state to operate a lottery. This lottery is known as the Florida Education Lotteries and directs proceeds to the State Education Lotteries Trust Fund.

To allow activities that would otherwise be illegal lotteries, the Legislature has carved out several narrow exceptions to the statutory lottery prohibition. Statutory exceptions are provided for charitable bingo, charitable drawings, and game promotions. Charities use drawings or raffles as a fundraising tool. Organizations suggest a donation, collect entries, and randomly select an entry to win a prize. Under s. 849.0935, F.S., qualified organizations may conduct drawings by chance, provided the organization has complied with all applicable provisions of ch. 496, F.S. Game promotions, often called sweepstakes, are advertising tools by which businesses promote their goods or services. As they contain the three elements of a lottery: consideration, chance, and prize, they are generally prohibited by Florida law unless they meet a statutory exception.<sup>18</sup>

### *Slot machines*

Slot machines have been generally prohibited in Florida since 1937.<sup>19</sup> Section 849.16, F.S., defines a slot machine as a machine or device that requires the insertion of a piece of money, coin, account number, code, or other object or information to operate and allows the user, whether by application of skill or by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, to receive money, credit, allowance, or thing of value, or secure additional chances or rights to use such machine, apparatus, or device. Slot machines are authorized at certain facilities in Broward and Miami-Dade counties by constitutional amendment or statute and are regulated under ch. 551, F.S.<sup>20</sup>

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<sup>14</sup> Florida House of Representatives Select Committee on Gaming, Final Bill Analysis of 2013 CS/HB 155, p. 1 (Apr. 19, 2013).

<sup>15</sup> s. 546.10, F.S.

<sup>16</sup> Article X, s. 7, Fla. Const. *But, see*, Article X, s. 15, Fla. Const., authorizing lotteries operated by the state.

<sup>17</sup> *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854 (1939).

<sup>18</sup> *Little River Theatre Corp.*, *supra* at 868.

<sup>19</sup> s. 849.15, F.S., originally enacted by s. 1, ch. 18143, L.O.F. (1937).

<sup>20</sup> *See* Article X, Section 23, Florida Constitution; ch. 2010-29, L.O.F. and chapter 551, F.S.

## *Gaming Compact*

Chapter 285, F.S., ratified the gaming compact with the Seminole Tribe of Florida (the "2010 Compact"). It provides that it is not a crime for a person to participate in raffles, drawings, slot machine gaming, or banked card games (e.g., blackjack or baccarat) at a tribal facility operating under the compact.<sup>21</sup> The 2010 Compact provides for revenue sharing. For the exclusive authority to offer banked card games on tribal lands at five locations and to offer slot machine gaming outside Miami-Dade and Broward Counties, the Seminole Tribe pays the State of Florida a share of "net win" (approximately \$240 million per year). Section 285.710(1)(f), F.S., designates the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation as the "state compliance agency" having authority to carry out the state's oversight responsibilities under the 2010 Compact. The 2010 Compact took effect when published in the Federal Register on July 6, 2010 and lasts for 20 years, expiring July 31, 2030, unless renewed.

The 2010 Compact provides for a reduction in revenue sharing if "internet/online gaming (or any functionally equivalent remote gaming system that permits a person to game from home or any other location that is remote from a casino or other commercial gaming facility)" is offered in the state.<sup>22</sup> However, revenue sharing is only reduced during the Guaranteed Minimum Revenue Sharing Cycle, which has expired. If fantasy contests are not considered internet gaming, the 2010 Compact also provides that if Florida law is amended to allow the operation of a new type of class III gaming that was not in operation as of February 1, 2010 ("new games"), the payments due to the State shall cease when the newly authorized gaming begins to be offered. Class III gaming is defined as any gaming that is not class I or class II gaming under the federal law.<sup>23</sup>

A new compact was executed by the Governor and the Tribe on December 7, 2015 (the "2015 Compact"), but must be ratified by the Legislature and approved by the United States Secretary of the Interior to become effective.<sup>24</sup> If the 2015 Compact is ratified and approved, it will provide the Tribe exclusivity to operate certain games, with certain exceptions.<sup>25</sup> In exchange, the Tribe will share revenue with the state with a Guaranteed Minimum Compact Term Payment of \$3 billion over 7 years. The 2015 Compact contains "internet/online gaming" and "new games" provisions similar to the 2010 Compact. If state law is amended to permit "internet/on-line gaming," the Tribe will no longer be required to make payments to the state based on the Guaranteed Minimum Compact Term Payment (\$3 billion), but will be required to make Revenue Share Payments.<sup>26</sup> Internet gaming is not defined in the 2015 Compact and fantasy contests are not specifically mentioned. Although the 2015 Compact does not specifically discuss fantasy contests, the 2015 Compact payment reduction may be triggered if fantasy contests are considered internet gaming and fantasy contests are authorized after July 1, 2015.<sup>27</sup> If fantasy contests are not considered "internet/on-line gaming" under the 2015 Compact, the "new games" provision may apply. If the "new games" provision applies, revenue sharing would end.<sup>28</sup>

### *Pari-mutuel wagering*

Chapter 550, F.S., authorizes pari-mutuel wagering at licensed tracks and frontons and provides for state regulation. Pari-mutuel is defined as "a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes."<sup>29</sup>

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<sup>21</sup> s. 285.710, F.S.

<sup>22</sup> *2010 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, p. 37 (April 7, 2010), on file with the Business & Professions Subcommittee.

<sup>23</sup> 25 U.S.C. 2703(8).

<sup>24</sup> s. 285.710, F.S.

<sup>25</sup> *2015 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, p. 43 (Dec. 7, 2015), on file with the Business & Professions Subcommittee.

<sup>26</sup> *Id.* at 50.

<sup>27</sup> LEGAL SPORTS REPORT, *Daily Fantasy Sports Industry Increasingly Running Into Tribal Gaming Concerns*, <http://www.legalsportsreport.com/6950/dfs-and-tribal-gaming/> (last accessed Jan. 14, 2016).

<sup>28</sup> *2015 Gaming Compact*, p. 44.

<sup>29</sup> s. 550.002(22), F.S.

Chapter 551, F.S., authorizes slot machine gaming at the location of certain licensed pari-mutuel locations in Miami-Dade County or Broward County and provides for state regulation. Chapter 849, F.S., authorizes cardrooms at certain pari-mutuel facilities.<sup>30</sup> A license to offer pari-mutuel wagering, slot machine gambling, or a cardroom at a pari-mutuel facility is a privilege granted by the state.<sup>31</sup>

Except for the Seminole casinos authorized in the 2010 Compact, free-standing, commercial casinos are not authorized, and gaming activity, other than what is expressly authorized, is illegal.

### *Fantasy contests in Florida*

The Florida Constitution, Florida Statutes, and Florida courts have not specifically addressed fantasy contests. Regardless of whether fantasy contests are games of skill or games of chance, they may be subject to the state's gambling laws and anti-bookmaking statute. Section 849.14, F.S., provides that a stake, bet, or wager of money or another thing of value placed "upon the result of any trial or contest of skill, speed, power, or endurance of human or beast" is unlawful. Receiving money or acting as the custodian or depository of money as part of such a stake, bet, or wager is also unlawful.

Section 849.25, F.S., Florida's anti-bookmaking statute, defines bookmaking as "the act of taking or receiving, while engaged in the business or profession of gambling, any bet or wager upon the result of any trial or contest of skill, speed, power, or endurance of human, beast, fowl, motor vehicle, or mechanical apparatus or upon the result of any chance, casualty, unknown, or contingent event whatsoever." The statute includes factors that are to be considered evidence of bookmaking, including charging a percentage on accepted wagers, receiving more than five wagers in a day, and receiving over \$500 in total wages in a single day or over \$1500 in a single week.<sup>32</sup>

On January 8<sup>th</sup>, 1991, Florida Attorney General Robert A. Butterworth provided an advisory legal opinion<sup>33</sup> regarding whether participation in a fantasy sports league violated Florida's gambling laws. Butterworth concluded that the operation of a fantasy league would violate s. 849.14, F.S. Butterworth concluded that since the fantasy sports league's entry fee was used to make up the prizes, it qualified as a "stake, bet, or wager" under Florida law.<sup>34</sup> He stated that, "while the skill of the individual contestant picking the members of the fantasy team is involved, the prizes are paid to the contestants based upon the performance of the individual professional football players in actual games."<sup>35</sup>

Butterworth concluded that contests, in which the skill of the contestant predominates over the element of chance, such as in certain sports contests, are not prohibited lotteries. As an example, he noted that golf and bowling tournaments were contests of skill and were not prohibited. He considered that "it might well be argued that skill is involved in the selection of a successful fantasy team by requiring knowledge of the varying abilities and skills of the professional football players who will be selected to make up the fantasy team."<sup>36</sup>

Fantasy contests may be subject to Florida's anti-lottery laws. Players in daily fantasy contests are competing for a distribution of a prize that may be made from a pool of funds that are made up of players' contributions. It is unknown whether all fantasy contest operators conduct fantasy contests similarly. Numerous types of contests are currently being offered, including, but not limited to, cash games, guaranteed prize pool games, double-up or 50/50 games, and head-to-head games. Most prizes appear to be based on the accumulation of entry fees and contests have been cancelled when

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<sup>30</sup> s. 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>31</sup> See s. 550.1625(1), F.S., "...legalized pari-mutuel betting at dog tracks is a privilege and is an operation that requires strict supervision and regulation in the best interests of the state."

<sup>32</sup> s. 849.25(1)(b), F.S.

<sup>33</sup> 91-03 Fla. Op. Att'y Gen. (1991).

<sup>34</sup> *Creash v. State*, 131 Fla. 111, 118 (Fla. 1938).

<sup>35</sup> 91-03 Fla. Op. Att'y Gen. (1991).

<sup>36</sup> *Id.*

the number of required participants has not been met and operators reserve the right to cancel contests at their discretion.<sup>37</sup>

These types of games may be considered pool betting or pari-mutuel betting. The Attorney General of Nevada has determined that daily fantasy contests constitute sports pools.<sup>38</sup> Daily fantasy contest sites may apply to the Nevada Gaming Control Board for a license to operate a sports pool in the state. Internationally, some daily fantasy contest sites are licensed for pool betting.<sup>39</sup> The Florida Constitution<sup>40</sup> prohibits lotteries other than pari-mutuel pools authorized by law as of the effective date of the 1968 Constitution.

### *Fantasy contests in the United States*

The federal Unlawful Internet Gambling Enforcement Act of 2006<sup>41</sup> ("UIGEA") prohibits the processing of certain online financial wagering to prevent payment systems from being used in illegal online gambling. The UIGEA prohibits gambling businesses from knowingly accepting payments in connection with a "bet or wager" that involves the use of the Internet and that is unlawful under any federal or state law.

The UIGEA expressly states that participation in fantasy or simulation sports contests is not included in the definition of "bet or wager"<sup>42</sup> when certain conditions are met. For purposes of the UIGEA, participation in a fantasy or simulation sports contest is not a bet or wager when:

- Prizes and awards offered to winning participants are established and made known in advance of the game or contest and the value is not determined by the number of participants or amount of fees paid by the participants.
- Winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals.
- Winning outcomes are not based on the score, point spread, or any performance of any single sports team or combination of such teams or solely on a single performance of an individual athlete in a single sporting event.

Contest operators argue that they are legal under the UIGEA. In *Humphrey v. Viacom, Inc.*, the district court determined that because the entry fee was paid "unconditionally," the owner did not participate, and the prizes were guaranteed and determined in advance, the fantasy contest entry fees were not "wagers" under the act.<sup>43</sup> However, although the UIGEA exempts fantasy and simulation sports contests from the application of the UIGEA, it does not make such contests legal generally. The UIGEA does not change or preempt any other federal or state law. As expressed in the Rule of Construction in the UIGEA, "no provision of this subchapter shall be construed as altering, limiting, or extending any federal or state law or tribal-state compact prohibiting, permitting, or regulating gambling within the United States."<sup>44</sup> Therefore, any other state or federal law could apply.

The federal Professional and Amateur Sports Protection Act of 1992 ("PASPA") states that it is unlawful for a governmental entity or person to operate or promote any gambling that is based directly or indirectly on one or more competitive sports games or on the performance of an amateur or professional athlete in a competitive sports game.<sup>45</sup> States are prohibited from authorizing or licensing

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<sup>37</sup> FANDUEL, Terms of Use, <https://www.fanduel.com/terms> (last visited January 16, 2016).

<sup>38</sup> 2015-102 Nev. Op. Att'y Gen. 8 (2015).

<sup>39</sup> DraftKings, Inc. is licensed for Pool Betting and Gambling Software by the UK Gambling Commission. <https://secure.gamblingcommission.gov.uk/gccustomweb/PublicRegister/PRAccountDetails.aspx?accountNo=42475> (last visited January 6, 2015).

<sup>40</sup> FLA. CONST. art. X, s. 7.

<sup>41</sup> 31 U.S.C. § 5361-5366 (2006).

<sup>42</sup> 31 U.S.C. § 5362(1) (2006).

<sup>43</sup> *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. June 20, 2007).

<sup>44</sup> 31 U.S.C. § 5361(b) (2006).

<sup>45</sup> 28 U.S.C. § 3702 (1992).

sports betting not already legal as of 1992.<sup>46</sup> A professional or amateur sports organization whose competitive game is alleged to be the basis of a violation of PASPA has standing to bring a civil action in federal district court to enjoin a violation. Currently, the NCAA and others are suing the state of New Jersey for attempting to repeal an anti-sports betting statute.<sup>47</sup>

Because many fantasy contests are operated in partnership with a professional sports league, it may be unlikely that such contests would face legal challenge under PASPA.<sup>48</sup> However, the National Collegiate Athletic Association has historically been fearful of online gambling, so college-related fantasy contests may be open to a higher risk of a legal challenge under PASPA.<sup>49</sup> Additionally, contests that offer the opportunity for users to bet on game results rather than player performance are at an elevated risk of a legal challenge due to PASPA language that provides that it is unlawful to operate or promote gambling indirectly on a sports game or performance.<sup>50</sup> PASPA prohibits betting, gambling, or wagering on one or more performances of professional or amateur athletes in a competitive game.<sup>51</sup>

The federal Illegal Gambling Business Act of 1970 ("IGBA")<sup>52</sup> defines an "illegal gambling business" as a gambling business that is in violation of the law of the state in which it is conducted, involves five or more persons who conduct or manage all or part of such business, and that has been in continuous operation for a period of more than 30 days or has a gross revenue of \$2000 in a single day. The IGBA specifically exempts savings promotion raffles and bingo games, lotteries, or other games of chance operated by certain non-profit corporations.<sup>53</sup> An employee or company that has violated the IGBA is subject to penalties including fines, forfeiture of profits and assets, and imprisonment for up to 5 years.

Several states, including Arizona, Iowa, Louisiana, Montana, and Washington have current laws that have been interpreted to make fantasy contests illegal in their jurisdictions, though some of those states have recently proposed legislation to legalize and regulate fantasy contests.<sup>54</sup> Several other states, including California, Illinois, Massachusetts, and Pennsylvania, have proposed legislation to clarify and regulate fantasy contests.<sup>55</sup> Proposed legislation in Florida, Illinois, Louisiana, Missouri, Pennsylvania, and Washington uses language from the UIGEA to legalize and regulate fantasy contests. The proposed Illinois legislation is similar to the Florida bill.<sup>56</sup> Maryland and Kansas expressly legalized fantasy contests in 2012 and 2015, respectively. Currently, there is not a regulatory framework for fantasy contests in the State of Florida.

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<sup>46</sup> Nevada, Delaware, Montana, and Oregon allowed sports betting in 1992 and met the criteria under the law.

<sup>47</sup> *NCAA v. Governor of the State of N.J.*, 730 F.3d 208 (3d Cir. Sept. 17, 2013). The Court determined that New Jersey's law violated PASPA because it authorizes sports gambling, but has since granted a re-hearing of the case which vacates the original decision.

<sup>48</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, U. Ill. L. Rev. (accepted for publication in January 2016 edition).

<sup>49</sup> See Marissa Lankester, *Time to Fight against Sports Gambling*, Star Ledger (Newark, NJ), May 29, 2014, at 17.

<sup>50</sup> *Edelman* at 34.

<sup>51</sup> SPORTS LAW BLOG, *No Question, PASPA Applies to Daily Fantasy Sports*, <http://sports-law.blogspot.com/2016/01/no-question-paspa-applies-to-daily.html> (last visited Jan. 14, 2016).

<sup>52</sup> 18 U.S.C. § 1995 (1970).

<sup>53</sup> See 26 U.S.C. § 501.

<sup>54</sup> Iowa, Louisiana, and Montana brought forth unsuccessful legislation to clarify and regulate fantasy contests in 2015. Washington held a committee hearing on a bill to be introduced in the 2016 session.

<sup>55</sup> See LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Jan. 6, 2016).

<sup>56</sup> HB 4323 (IL 2016).

## Effect of the bill:

The bill creates s. 501.935, F.S., to regulate fantasy contests. Chapter 501 is entitled "Consumer Protection" and is regulated by DACS. The bill provides requirements for fantasy contest operators, including registration requirements, and outlines penalties for violations of the provisions.

The bill defines the term "fantasy contest" to mean a fantasy or simulation sports or contest where the contest participant manages and owns a fantasy or simulation sports team made up of human athletes or players that are members of an amateur or professional sports organization and that meets the following conditions:

- The membership of the fantasy or simulation sports team may not be based on the current membership of an actual team.
- The value of all prizes and awards offered to winning players must be established and made known in advance of contest.
- Winning outcomes must reflect the relative knowledge and skill of the players and are determined by accumulated statistical results of the performance of human athletes or players.
- Winning outcomes may not be based on the score, point spread, or any performance of any single sports team or combination of such teams or solely on a single performance of a single human athlete or player in a single sporting event.

Although this definition generally follows the exception provided in the UIGEA, the requirement that the value of the prize "is not determined by the number of participants or the amount of fees paid by those participants" is not included.<sup>57</sup>

The bill defines the term "fantasy contest operator" to mean a person or entity that offers fantasy contests for a cash prize to 750 or more members of the general public per year. A fantasy contest operator must register with the department to offer fantasy contests in the state and pay an initial registration fee of \$500,000 and an annual renewal fee of \$100,000.

A fantasy contest operator is required to implement the following procedures:

- Restrict employees of the fantasy contest operator and certain relatives of such employees from competing in fantasy contests with a cash prize of more than \$5.
- Restrict fantasy contest operators from being a contest participant in the contest offered by the operator.
- Prevent employees of the contest operator from sharing confidential information that could affect fantasy contest play.
- Verify that contest players are 18 years of age or older.
- Restrict a person from entering a fantasy contest that is determined on the accumulated statistical results of a team of individuals in which the person is a player, game official or other participant.
- Allow a person to restrict or prevent his or her own access to a fantasy contest upon request.
- Disclose the number of entries that a fantasy contest player may submit to a fantasy contest and provide steps to prevent players from submitting more than the allowable number.
- Separate contest players' funds from operational funds and maintain a reserve.
- Contract with a third party to perform an annual independent audit to ensure compliance with this section and submit the results to the Department Agriculture and Consumer Services (DACs).
- Offer training to employees on responsible play and work with and fund a compulsive or addictive behavior prevention program.

The bill provides that a person, firm, corporation, association, agent, or employee who violates the provisions in this bill is subject to a civil penalty not to exceed \$1,000 which shall accrue to the state and may be recovered through civil action brought by DACS. The bill provides rulemaking authority to DACS.

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<sup>57</sup> 31 U.S.C. § 5362(1)(E)(ix)(1).  
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The bill provides that "fantasy contests" as defined in the bill would be exempt from regulation under ch. 849, F.S., entitled "Gambling." The bill provides that a person or entity that offers fantasy contests to fewer than 750 members of the public per year is not considered a "contest operator" and is exempt from regulation under ch. 849, F.S., and from the requirements on contest operators imposed in the bill.

**B. SECTION DIRECTORY:**

Section 1 amends s. 501.935, F.S., to provide requirements for the operation of fantasy contests, provide that violation of such requirements will result in a civil penalty, specify that fantasy contests are excluded from gambling regulation, and provide that certain persons or entities are not considered contest operators and are exempt from certain regulations.

Section 2 provides an effective date of July 1, 2016.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

DACS assumes that there will be two registrants based on the number of registrations in other states that have enacted similar legislation. DACS estimates \$1,000,000 in non-recurring revenues for 2016-17 and \$200,000 in annual recurring revenues for 2017-18 and 2018-19.<sup>58</sup>

**2. Expenditures:**

\$281,427 for 2016-17 and \$178,868 for 2017-18 and 2018-19 per DACS analysis.<sup>59</sup> This includes the cost of DACS's estimated need of hiring one additional Senior Attorney. The bill also requires DACS to use 7.5% of the initial registration fee (\$35,500) and subsequent renewal registration fee (\$7,500) to fund a compulsive or addictive play prevention program.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None.

**2. Expenditures:**

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Game operators would be required to pay an initial registration fee of \$500,000 with an annual renewal fee of \$100,000. The fees may preclude new operators from entering the fantasy contest market.

**D. FISCAL COMMENTS:**

Members expressed concerns regarding the effectiveness of a compulsive or addictive play prevention program and the amount of funds that would be directed toward such a program under the bill. A similar provision was enacted in 2005 that requires slot machine licensees to pay an annual fee of \$250,000 to fund a compulsive or addictive gambling prevention program to the Division of Pari-Mutuel Wagering under the Department of Business and Professional Regulation.<sup>60</sup>

The bill does not require the fantasy contest operator to pay tax on revenues collected. Currently, amusement games and machines are taxed at a rate of 4%, slot machines at 35%, cardrooms at 10%, and pari-mutuel wagering at 1.5%. In addition, these businesses may pay licensing fees. Wagers placed on sports events or contests, in a wagering pool on a sports event or contest, or in a lottery

<sup>58</sup> Department of Agriculture and Consumer Services, Agency Analysis of 2015 Senate Bill 832, p. 3 (Nov. 25, 2015).

<sup>59</sup> *Id.*

<sup>60</sup> s. 551.118, F.S.

conducted for profit are taxed by the Internal Revenue Service at a rate of 0.25% for wagers authorized under the law of the state in which the wager was accepted and a rate of 2% for wagers not authorized under the law of the state in which the wager was accepted.<sup>61</sup> It is unknown whether existing contest operators are currently paying the excise tax for wagers to the Internal Revenue Service.

The initial response from many states as to how to tax fantasy contests and winnings has been to treat winnings as income and require taxpayers to report those winnings. The question of whether and when fantasy contest operators are required to report the winnings, and when and how losses may be claimed against winnings, varies according to state. Other states are presently determining if and how to tax fantasy contest operators. Massachusetts and Nevada have indicated that contest operators will have to comply with relevant tax laws.<sup>62</sup> Pennsylvania proposed a 5% tax on the monthly gross tournament revenue in 2015.<sup>63</sup>

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

##### 2. Other:

Indeterminate.

#### B. RULE-MAKING AUTHORITY:

DACS is given rulemaking authority under the bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### *DACS recommendations*

The bill currently requires DACS to review audits, assess penalties, and file a civil action for infractions. DACS recommends that administrative remedies be made available for smaller infractions.<sup>64</sup> For example, in similar regulatory programs under DACS, the department may provide a cease and desist order, issue a notice of noncompliance, place a registrant on probation, or revoke or suspend a registration before taking further action.<sup>65</sup> Further, the bill could be amended to specify where the funds from civil penalties should be paid.

##### *General comments*

Concerns were raised about whether DACS would be able to revoke the registration of a contest operator who has violated a provision of the bill, whether DACS could prohibit felons from becoming contest operators, and whether background checks would be required.

Other consumer protection concerns have been raised around the country. Massachusetts has proposed rules to provide consumer protection including limiting each player to a deposit of \$1000 per month, requiring prominent disclaimers, requiring advertising indicating where problem participants can get help, prohibiting fantasy contests based on the performance of high school and college athletes,

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<sup>61</sup> 26 U.S.C § 4401.

<sup>62</sup> BLOOMBERG BNA, *Fantasy Sports New Tax Issue For States*, <http://www.bna.com/fantasy-sports-new-n57982066133/> (last visited Jan. 14, 2016).

<sup>63</sup> HB 1197 (PA 2015).

<sup>64</sup> Department of Agriculture and Consumer Services, Agency Analysis of 2015 Senate Bill 832, p. 2 (Nov. 25, 2015).

<sup>65</sup> See s. 496.419(5) (solicitation of contributions), s. 559.921(4) (motor vehicle repair), s. 507.09 (intrastate movers), s. 501.612(2) (telemarketing), and s. 559.9355 (sellers of travel).

limiting certain games to beginner participants,<sup>66</sup> and requiring participants from the state to be at least 21 years old.<sup>67</sup>

The bill states that one of the conditions required to meet the definition of the term "fantasy contest" is that the value of all prizes and awards offered to winning players must be established and made known in advance of the contest. This condition differs from similar language in the UIGEA which states that additionally, the value of such prizes "is not determined by the number of participants or the amount of any fees paid by those participants". If the bill language is intended to conform to the UIGEA language, this could be amended.

Also in conformance with the Court's interpretation of the UIGEA,<sup>68</sup> a requirement could be added that requires fantasy contest operators to guarantee the prize once the contest is offered. Currently, game operators reserve the right to cancel contests after entry. Other games in Florida such as sweepstakes and raffles require such guarantee.

The bill does not restrict a contest participant from filling his or her fantasy team with a majority of players from the same actual team, which could create an argument that the participant has created a team based on the current membership of an actual team and thus is seeking a winning outcome based indirectly on a sports game or performance, which may violate PASPA.

Currently, the bill only categorizes fantasy contests into two areas: those run by a contest operator who offers games to more than 750 people and those offered by a contest operator to less than 750 people. Considerations such as the amount of the entry fee, or whether the contest operator is operating the contest for free or collecting part of the entry fee as payment for the contest operation, are not considered. Language could be clarified to indicate that only persons or entities that offer cash prizes for a profit are subject to certain regulations and a tiered approach to regulation could allow smaller contest operators to function without requiring a \$500,000 licensing fee, while at the same time ensuring consumer protection.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 12, 2016, the Business & Professions Subcommittee adopted a strike-all amendment and an amendment to the strike-all and reported the bill favorably as a committee substitute. The amendments:

- Define the term "confidential information" to mean information related to fantasy contests which is obtained solely as a result of a person's employment with a contest operator;
- Revise the definition of fantasy contest to require that the membership of the fantasy or simulation sports team not be based on the current membership of an actual amateur or professional sports team;
- Clarify that athletes or players chosen as part of a fantasy contest team must be human;
- Revise the definition of the term "contest operator" to specify that contests must be offered by such operator to 750 or more members of the public per year in order to qualify as a "contest operator;"
- Require the contest operator to register with the Department of Agriculture and Consumer Services and pay a registration fee to operate in the state;
- Prohibit game officials from participating in fantasy contests;
- Prohibit employees from sharing confidential information that could affect fantasy contest play until the information is publicly available;
- Require that the annual audit be done in compliance with specified accounting principles;

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<sup>66</sup> Some have argued that professional fantasy contest participants have an unfair advantage over regular participants. Statistics show that 91% of contest prizes were won by 1.3% of the participants. See McKinsey & Company, *For daily fantasy-sports operators, the curse of too much skill*,

[http://www.mckinsey.com/insights/media\\_entertainment/for\\_daily\\_fantasy\\_sports\\_operators\\_the\\_curse\\_of\\_too\\_much\\_skill](http://www.mckinsey.com/insights/media_entertainment/for_daily_fantasy_sports_operators_the_curse_of_too_much_skill) (last visited Jan. 16, 2016).

<sup>67</sup> Boston Globe, *Mass. AG proposes age limit for daily fantasy sports*, <https://www.bostonglobe.com/business/2015/11/19/healey-proposes-fantasy-sports-regulations-amid-scrutiny/iCzChEn1pfAdfuKuNuqLtM/story.html> (last visited January 13, 2016).

<sup>68</sup> *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. June 20, 2007).

- Require the contest operator to offer training to employees on responsible play and to work with and fund a compulsive or addictive behavior prevention program;
- Provide an exemption for persons or entities that offer fantasy contests to fewer than 750 members of the public per year from regulation under chapter 849 and the registration fee; and
- Provide rulemaking authority to DACS.

The staff analysis is drafted to reflect the committee substitute.