

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: SB 1428

INTRODUCER: Senator Smith

SUBJECT: Operation of the Florida Lottery

DATE: April 19, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	FT	_____
4.	_____	_____	GA	_____
5.	_____	_____	WPSC	_____
6.	_____	_____	_____	_____

I. Summary:

The bill authorizes the operation of the Department of Lottery (department) under a management agreement. The bill provides that if the department enters into a management agreement, no employee or contractor of the manager shall receive membership in the Florida Retirement System or any other state retirement or other state employee benefits.

The bill creates a new section of law to provide the requirements for a management agreement. The bill provides that it is the intent of the Legislature that the manager be accountable to the Legislature and the people of this state. The bill provides full and complete authority for a management agreement between the department and a manager. The management agreement may not exceed a 30 year term. The bill provides that the department may not enter into a management agreement that authorizes video lottery games, pari-mutuel wagering, sports betting, or any other game commonly considered to be a form of gambling that is not a game or variation of a game that the department operated before the management agreement is executed.

The bill provides certain requirements that are necessary for the management selection process, notice procedures, selection procedures, and other management agreement requirements. The bill prohibits the manager from earning excess revenue from the management agreement.

The bill also provides for the operation of a player-activated machine that dispenses instant lottery game tickets that is not under the supervision or within the direct line of sight of the lottery retailer if the machine uses a method of verifying the age of an operator that the department certifies is equivalent or superior to line-of-sight monitoring and lockout by the retailer.

This bill amends sections 20.317, 24.101, 24.102, 24.103, 24.104, 24.105, 24.107, 24.108, 24.111, 24.112, 24.113, 24.114, 24.115, 24.1153, 24.117, 24.118, 24.120, 24.121, 24.122, 24.123, and 24.124, Florida Statutes.

This bill creates section 24.1115, Florida Statutes.

II. Present Situation:

The Department of the Lottery is authorized by Art. X, s. 15, Florida Constitution, which states that “[l]otteries may be operated by the state.” Chapter 24, F.S., was enacted by ch. 87-65, L.O.F., to establish the state lottery. Section 24.102, F.S., provides legislative purpose and intent in regard to the lottery:

- (1) The purpose of this act is to implement s. 15, Art. X of the State Constitution in a manner that enables the people of the state to benefit from significant additional moneys for education and also enables the people of the state to play the best lottery games available.
- (2) The intent of the Legislature is:
 - (a) That the net proceeds of lottery games conducted pursuant to this act be used to support improvements in public education and that such proceeds not be used as a substitute for existing resources for public education.
 - (b) That the lottery games be operated by a department of state government that functions as much as possible in the manner of an entrepreneurial business enterprise. The Legislature recognizes that the operation of a lottery is a unique activity for state government and that structures and procedures appropriate to the performance of other governmental functions are not necessarily appropriate to the operation of a state lottery.
 - (c) That the lottery games be operated by a self-supporting, revenue-producing department.
 - (d) That the department be accountable to the Legislature and the people of the state through a system of audits and reports and through compliance with financial disclosure, open meetings, and public records laws.

Section 20.317(3), F.S., provides that the department shall be located in Tallahassee. Regional offices may be established throughout the state as necessary for the efficient operation of the lottery.

Section 24.104, F.S., requires the department to operate the state lottery “so as to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens.”

Section 24.105(2), F.S., requires the department to supervise and administer the operation of the lottery.

Section 24.105(16), F.S., provides that the department may enter into contracts for the purchase, lease, or lease-purchase of such goods and services as are necessary for the operation and promotion of the state lottery. However, s. 24.111(1), F.S., prohibits the department from contracting with any person or entity for the total operation and administration of the state

lottery. Instead, the department may make procurements which integrate functions such as lottery game design, supply of goods and services, and advertising.

Section 24.122, F.S., states that the act shall not be construed to authorize any lottery except the lottery operated by the department.

According to the department, the department continues to fulfill its mission of maximizing revenues for the enhancement of public education. Since inception, the department has contributed close to \$21 billion to the Educational Enhancement Trust Fund, funding more than \$1 million to Bright Future Scholarships for more than 450,000 students in the state and contributing to K-12 programs, community colleges, state universities, workforce education programs, and other state student financial aid. Additionally, lottery revenues have been pledged for the purpose of repaying school construction bonds issued by the state's Division of Bond Finance.

III. Effect of Proposed Changes:

Section 1. Amends s. 20.317(3), F.S., by providing that the department may establish regional offices throughout the state as the secretary deems necessary to perform its duties concerning the efficient operation of the state lottery.

Section 2. Amends s. 24.101, F.S., to change "act" to "chapter." This change is made throughout the remainder of the bill.

Section 3. Amends s. 24.102, F.S. to provide that the department may operate with the assistance of an entrepreneurial business enterprise under a management agreement overseen by the department. Any entity contracted with under a management agreement must also be accountable to the Legislature and the people of the state.

Section 4. Amends s. 24.103, F.S., to provide a definition for management agreement and manager. "Management agreement" means that agreement entered into pursuant to which the state may contract with a manager to provide services to the lottery, although under such an agreement the department shall continue to manage and operate the lottery, but the manager may receive a certain share of lottery ticket sales or related proceeds in consideration of the payment of a fee or fees to the state. "Manager" means an entity that provides management services to the lottery on behalf of the department under the management agreement.

The definition for "retailer" was also changed to mean a person who sells tickets on behalf of the department or the manager.

Section 5. Amends s. 24.104, F.S., to provide that the purpose of the department is to operate the lottery with or without a manager.

Section 6. Amends s. 24.105, F.S. to expand the powers and duties granted to the department to a manager if the department enters into a management agreement. The bill provides that the department shall supervise the operation of the lottery with or without a manager. The bill provides that the monthly and annual reports may be submitted by a manager if the lottery has

entered into a management agreement. The bill provides that if the lottery has entered into a management agreement, the manager is required to maintain comparable information to the weekly records of the lottery transactions that the department is required to maintain. The bill provides that if the department has entered into a management agreement, the manager is not required to make a continuing study of the reaction of the public to existing and potential features of the lottery as the department is so required to make.

The bill provides that the department is required to adopt do not change regardless of whether the department enters into a management agreement. However, the player-activated machine may not be required to be deactivated by the retailer to prevent underage use if the machine can verify the age of an operator in such a way that the department certifies is equivalent or superior to line-of-sight monitoring and lockout.

The bill provides that regardless of whether the department enters into a management agreement, the lottery drawings shall be public and witnessed by an accountant employed by an independent certified public accounting firm.

The bill provides that if the department enters into a management agreement, no employee or contractor of the manager shall receive membership in the Florida Retirement System or receive other state employee benefits.

Section 7. Amends s. 24.107, F.S., to add that the manager may advertise the sum of all prize payments for a prize that will be paid over a period of years. The manager may also act as a retailer and may conduct promotions that involve the dispensing of lottery tickets free of charge.

Section 8. Amends s. 24.108, F.S., to conform the language to current bill drafting conventions and to clarify that the department shall, at least once every 2 years, engage an independent firm experienced in security procedures to conduct a comprehensive study and evaluation of all aspects of security in the operation of the department.

Section 9. Amends s. 24.111, F.S., to provide that the department may contract with any person or entity for the total operation and administration of the state lottery.

Section 10. Creates s. 24.1115, F.S., to provide the requirements for a management agreement. The bill provides that it is the intent of the Legislature that the manager be accountable to the Legislature and the people of this state. The bill provides that this section of law contains full and complete authority for a management agreement between the department and a manager. The management agreement may not exceed a 30 year term. The bill provides that the department may not enter into a management agreement that authorizes video lottery games, pari-mutuel wagering, sports betting, or any other game commonly considered to be a form of gambling that is not a game or variation of a game that the department operated before the management agreement is executed. The bill requires the manager to make an initial payment to the department that exceeds the “substantial benchmark amount” determined in the agreement. If the manager fails to make any payments, the agreement is terminated.

The management agreement must require all lottery proceeds initially to be directly deposited with the state. The manager shall only receive payment after all of the manager’s obligations to

the state have been satisfied. The state is required to retain an annual amount of at least equal to the lottery proceeds for the last fiscal year preceding the agreement as the “state annuity.”

The management agreement must include provisions to ensure that the manager does not earn excess revenue under the agreement. The agreement must include provisions that require the Office of Policy and Budget in the Executive Office of the Governor to calculate the average annual growth in gross revenue for the five years preceding the agreement and to calculate the growth under the management agreement. Any revenue captured in growth attributable to the manager will be divided in half between the state and manager. If no growth occurs, the department only pays the manager if the excess payments account has a positive balance.

The management agreement must contain the original term of the management agreement, requirement that the manager locate its principal office in this state, and the duties and obligations of the department to use the equipment and assets of the lottery, to assume the rights and obligations under contracts with retailers and vendors, to implement a comprehensive security program and system of audits, and to implement a program to curb compulsive gambling by persons playing the lottery. The agreement must also contain other provisions necessary to verify that the manager is complying with state law, procedures to amend the agreement, and procedures to terminate the manager if necessary.

Before the department enters into a management agreement, the secretary may retain an advisor to assess the fiscal feasibility of such an agreement to help determine whether to proceed. If the secretary wishes to move forward with such an agreement, the next step would require the department to issue a request for qualifications. The request must include factors or criteria used to determine qualifications and a statement that the proposal must be accompanied by evidence of the offeror’s financial responsibility. The bill provides notice requirements for the request.

The bill provides that the contents of the proposals for a management agreement are competitive sealed replies in response to an invitation to negotiate and are exempt from s. 119.07(1), F.S. Before entering into an agreement, the department shall consider the statement of qualifications and expertise, competence, skills, and plan to perform obligations under the management agreement as well as financial strength, experience in operating lotteries and gaming, and integrity, background, and reputation.

Once the department makes a preliminary selection of the manager, the department shall schedule a public hearing. The bill provides notice requirements for the hearing. If the department makes a favorable determination, the department shall submit the determination to the Governor. The Governor may then accept or reject the department’s determination. If the Governor accepts the determination and designates the manager, the department may execute an agreement with the manager.

The bill provides that this section does not prohibit the Legislature from authorizing forms of gambling that are not in direct competition with the lottery. The bill does not define what games would be in direct competition with the lottery.

Section 11. Amends s. 24.112, F.S., to exclude a manager from the regulations that pertain to retailers of lottery tickets. The bill provides that if the department does not enter into a

management agreement, the department shall adopt rules for contracting with retailers. The section also excludes managers from complying with statutory requirements for the selection of retailers which the department must otherwise comply.

Section 12. Amends s. 24.113, F.S., to provide that the manager shall encourage minority business enterprises and shall undertake training programs and other educational activities to enable minority persons to compete for such contracts.

Section 13. Amends s. 24.114, F.S., to conform language to current bill drafting conventions.

Section 14 and 15. Amends ss. 24.115 and 24.1153, F.S., to provide that the payment of prize provisions and the assignment of prize provisions apply to a manager if a management agreement is utilized.

Section 16, 17, and 18. Amends ss. 24.117, 24.118, and 24.120, F.S., to conform language to current bill drafting conventions.

Section 19. Amends s. 24.121, F.S., provides that the gross revenue from the sale of online and instant lottery tickets up to the amount of the state annuity requirement shall be deposited each year in the Educational Enhancement Trust Fund. If the department enters into a management agreement, the proceeds received by the department from the management agreement shall be deposited in the Educational Enhancement Trust Fund, with, at minimum, the greater of \$400 million or one-third of the funds deposited into the trust fund to be allocated to the Florida Bright Futures Scholarship Program.

Section 20. Amends s. 24.122, F.S., to provide that this chapter shall not be construed to authorize any lottery except the lottery operated by the department or the manager.

Section 21. Amends s. 24.123, F.S., to provide that the Legislative Auditing Committee shall contract with a certified public accountant for an annual financial audit of the department. The accountant shall have no financial interest in any vendor or manager with whom the department is under contract. The bill provides that the Auditor General may conduct an audit at any time of the management agreement.

Section 22. Amends s. 24.124, F.S., to conform language to current bill drafting conventions.

Section 23. Provides that the bill shall take effect on January 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

On line 693 the bill states that the proposals are competitive sealed replies in response to an invitation to negotiate for purposes of s. 119.071(1)(b), F.S. and are exempt from s. 119.07(1), F.S. and Art. I of s. 24(a) of the Florida Constitution.

It appears that this provision in the bill is a restatement of the current law and of the exemption in s. 119.071(1)(b), F.S. for responses for invitations to bid and requests for proposals to negotiate.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article X of s. 15 of the Florida Constitution authorizes a *state* run lottery. If the lottery is operated by a private management company, the lottery arguably will no longer be state run and the management agreement could be a violation of the Florida Constitution.

In addition to State Constitutional concerns, there may be federal implications. An October 2008 advisory opinion from the United States Department of Justice provides that the exemption state lotteries currently have from criminal prosecution under federal lottery laws would no longer apply if those lotteries were managed by private firms rather than the states.¹ The United States Department of Justice concluded that the “exemptions for lotteries ‘conducted by a State’ requires that the State exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a de minimis share of the equity interest in the profits and losses of the business...”²

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill does not suggest how the private manager would increase funds to the state as it appears the manager would be limited to the operation of the games currently authorized and operated by the department. It appears that if the manager does increase revenue, some of that increase would not be available to the state for education as it would be part of the compensation for the manager.

¹ *Scope of Exemption under Federal Lottery Statutes for Lotteries Conducted by a State Acting under the Authority of State Law*, Memorandum Opinion for the Acting Assistant Attorney General, Criminal Division, October 16, 2008.

² *Id.*

C. Government Sector Impact:

The bill provides an option for the Department of Lottery to be run by a private management company. If the functions of the department are run by a private entity, the jobs and functions currently conducted by state employees may be eliminated. The bill does not address the Lottery's current 438 full time employees and what if any impact the management agreement would have on their status.

The unknown cost of a management agreement and change in annual revenue stream could impact state education programs and local school districts.

The bill appears to shift the majority if not all of the powers and duties of the department to the manager, which will result in the loss of direct operational oversight and authority of a state agency. Assuming that all positions are maintained with the department, the manager merely adds an additional decision maker to the management and operation of the agency. It is unclear what benefit the state receives under the management agreement.

At this time, the fiscal impact cannot be determined.

VI. Technical Deficiencies:

Lines 1113, 1176, and 1212 should read that the department and the manager are discharged of liability and not that the department or manager are discharged. Both entities will be operating at the same time.

VII. Related Issues:

The bill states that the department shall continue to manage and operate the lottery. The bill does not explain what functions the department will maintain and what functions the manager will assume and how the department will continue to manage and operate the lottery with a private manager contracted to undertake those management functions.

The bill prohibits the department from selling the authorization to operate the lottery. It is unclear how the private manager agreement does not violate this provision.

On April 7, 2010, the Seminole Tribe entered into a Compact for exclusivity over Class III and "other casino-style" gaming with the Governor. The Compact is currently before the Legislature for possible ratification. It is unclear what impact permitting private management for the Department of Lottery may have on any compact exclusivity provisions and payment provisions with the Seminole Tribe of Florida. However, the exclusivity provisions in the gaming compact limit expansion of gaming not currently authorized under law. This bill appears to allow a manager to perform the function of the department but it prohibits the manager from authorizing new games that the lottery is not currently authorized to conduct. Such a limitation on the expansion of games appears to be within the allowable exceptions to exclusivity for the state and would not trigger any reduction in payments from the Tribe.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
