The Florida Lottery Act

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"Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

"The assertion that the poor disproportionately buy the state lottery tickets is only a myth."

"No self-respecting gambler will play the lottery. The odds are too bad."

In THIS Article, the author does not deal with the wisdom of the new lottery, except insofar as it discusses the wisdom of the provisions of the new lottery law which facilitate the implementation of the lottery. Nor does he attempt to deal comprehensively with every provision of the Florida Public Education Lottery Act. The length and complexity alone of the Act precludes such treatment. Rather, he discusses and amplifies various provisions, which by their nature are significant or which, at the personal whim of the author, are believed to be interesting.

In an article chastising the Florida Legislature for its repeated refusal to allow the citizens of Florida to decide whether they want a state lottery, one commentator asks, "Is there a lottery in Florida's future?" His article ends where this one begins; that is, with

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1. Lee v. City of Miami, 163 So. 486, 489 (Fla. 1935) (quoting from Phalen v. Virginia, 8 U.S. (How.) 163, 168 (1850)).
4. Ch. 87-65, 1987 Fla. Laws 239 (to be codified at FLA. STAT. § 24) [hereinafter Lottery Act].
the EXCEL 7 Lottery Petition proposing by initiative 8 an amendment to the Florida Constitution which would authorize a state-operated lottery. 9

Led by Ralph Turlington, then Commissioner of Education, EXCEL succeeded in collecting the constitutionally required number of signatures, 10 and the EXCEL proposal appeared on the ballot in the general election held on November 4, 1986. The proposal was adopted overwhelmingly by the citizens of the state, 11 who concurrently rejected by an even greater margin a proposal to allow casino gambling. 12

The adoption of the amendment did not, however, guarantee that Floridians could buy lottery tickets. The new provision only

7. This is an acronym for the citizens group, Excellence Campaign: An Education Lottery, which led the petition drive for the constitutional amendment authorizing a state-operated lottery.

8. The Florida Constitution, article XI, section 3, allows the people to circumvent the Legislature by providing for revisions and amendments of the constitution by initiative as follows:

The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

9. The full text of the EXCEL proposed amendment is as follows:

Article X, § 15, Florida Constitution, is created to read:

Section 15. State Operated Lotteries. -

(a) Lotteries may be operated by the State.

(b) If any subsections of the Amendment to the Florida Constitution are held unconstitutional for containing more than one subject, this Amendment shall be limited to subsection (a) above.

(c) This amendment shall be implemented as follows:

(1) Schedule - On the effective date of this Amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

FLA. CONST. art. X, § 15.

10. FLA. CONST. art. XI, § 3.

11. According to the Division of Elections of the Department of State, a total of 3,208,295 votes were cast on the EXCEL proposal. Of that total, 2,039,437 votes were cast in favor of the proposal, representing 63.5% of the vote. Telephone interview with staff, Fla. Dep't of State, Div. of Elections (Nov. 18, 1987).

12. A total of 3,273,805 votes were cast on the proposal to allow individual counties to determine whether to authorize casino gambling. Of that total, 2,2327,555 votes were cast against the proposal, representing 68.4% of the vote. Id.
authorized the state to operate a lottery. The Legislature needed to adopt implementing legislation. For this purpose, jurisdiction over lottery legislation was given to the Regulated Industries and Licensing Committee in the House, and to a Select Committee on the Lottery that was created in the Senate.

Representative Chris Meffert and Senator Ander Crenshaw, as chairmen of their respective committees, directed staff to begin developing proposed legislation which would implement the constitutional amendment. Staff quickly learned that an overwhelming body of information existed to assist in this process. From our perspective, the game was afoot.

I. LEGISLATIVE HISTORY

The House and Senate differed in their approaches to writing and enacting a lottery-implementing bill. Once jurisdiction had been given to the House Committee on Regulated Industries and Licensing, the Committee moved quickly to assimilate the information gathered from various sources into a working draft of a bill. By February 11, 1987, the Subcommittee on Pari-Mutuels and the Lottery began discussing the draft. The bill was refined at subse-

13. While the amendment does provide a name for the lotteries which may be operated by the state and designates a trust fund into which net proceeds are to be deposited for appropriation by the Legislature, those provisions were subject to change by the Legislature. This was due to concern that the proposed amendment might otherwise be held to contain more than one subject in violation of the Florida Constitution article XI, section 3. Comment, supra note 6, at 919. That concern was eliminated when the Florida Supreme Court upheld the proposed amendment against constitutional attack on grounds which included multiplicity of subjects. Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986).
14. Hereinafter Senate Select Committee.
15. Dem., Jacksonville.
16. Several lottery bills were filed during the 1987 session from which to gather information. Fla. Legis., History of Legislation, 1987 Combined Session, Subject Index-Bills at 517, HB 19, HB 163, HB 853, HB 1201, SB 12, SB 328, and SB 400. In addition, staff obtained copies of the lottery laws in the 22 states then operating a lottery, as well as those of the District of Columbia, the various Canadian provinces, and Puerto Rico. Various model lottery acts were also found to exist as well as lottery acts suggested by several lottery vendors. Finally, discussions with experts at the New Lottery States Seminar and Exposition sponsored by Public Gaming Research Institute Inc. on January 5-7, 1987, in Austin, Texas, and at a Spring 1987 Conference of the North American Association of State and Provincial Lotteries of February 13-17, 1987, in San Francisco, California, revealed a great deal of wisdom about how Florida ought to operate a lottery. At times it seemed as though those of us involved in drafting the bill might be unable to conceive an original thought.
17. Representative Meffert justified the early working draft by stating the "everybody's been sort of talking around the issues. We felt we needed to get something specific on the table." Autonomous Lottery Department proposed, Miami Herald, Feb. 12, 1987, at 28A, col. 5.
quent subcommittee and committee meetings before its adoption by the Committee on April 14. The committee bill was filed as House Bill 1247.\textsuperscript{18} By then, the bill contained several provisions which were abhorrent to the Governor,\textsuperscript{19} but which the Committee believed would best lead to an early and successful operation of the lottery. While additional changes were made to the bill as it was converted into a Committee Substitute by the Finance and Taxation Committee and a Committee Substitute for Committee Substitute by the Appropriations Committee, the fundamental differences between the House and Senate bills remained unchanged until the Conference Committee was convened. The Governor's opposition to the House Bill escalated, however, from mild praise to a threatened veto.\textsuperscript{20}

The Senate approach was to proceed slowly in preparing a bill.\textsuperscript{21} Following public hearings in Tampa and North Miami Beach, the Senate Select Committee traveled to Illinois and California to study the lottery operations in those states.\textsuperscript{22} Thereafter, the Senate Select Committee held workshops at which an issue paper specifying options available to the Committee was discussed.\textsuperscript{23} Not until the first week of the Regular Session did the Senate Select Committee reveal its first draft. Following several meetings at which this draft was revised, the Senate Select Committee submitted its work product to the Senate Commerce Committee, the first of four standing committees of reference.\textsuperscript{24} The bill was reported as a Committee Substitute by both the Senate Commerce and Senate Appropriations Committees, reported favorably without change by the Senate Education Committee, and withdrawn from the Senate Finance, Taxation & Claims Committee.\textsuperscript{25}

\textsuperscript{18} FLA. LEGIS., HISTORY OF LEGISLATION, 1987 COMBINED SESSIONS, HISTORY OF HOUSE BILLS at 371, HB 1247.

\textsuperscript{19} See, in particular, the discussion, infra, of the provisions of the bill relating to governance and the initiation of games.

\textsuperscript{20} Martinez affirms stand on lottery commission, Gainesville Sun, March 14, 1987, at 313, col. 5.

\textsuperscript{21} For a thorough review of the process by which the Senate Select Committee on the Lottery created its bill, see FINAL REPORT, FLORIDA SENATE COMMITTEE ON THE LOTTERY (Apr. 30, 1987) (on file with committee) [hereinafter FINAL SENATE REPORT].

\textsuperscript{22} Illinois was chosen because it operates a highly successful lottery in a state similar in size to Florida. California was chosen because it operates the largest lottery and was, at the time, the newest lottery state, thus possessing useful experience in initiating a lottery. Id. at 20.

\textsuperscript{23} Id.

\textsuperscript{24} FLA. LEGIS., HISTORY OF LEGISLATION, 1987 COMBINED SESSIONS, HISTORY OF SENATE BILLS at 86, SB 400.

\textsuperscript{25} Id.
The differences between the House and Senate bills were extensive, although most of the dispute revolved around governance, start-up deadlines, administrative procedures, retailer commissions, legislative budget review, and allocation of funds. These differences were resolved by the Conference Committee appointed for that purpose and are described in the summary of the Conference Committee Report. On June 3, Committee Substitute for Committee Substitute for House Bill 1247, as amended by the Conference Committee Report, was adopted 116-4 by the House and 30-3 by the Senate. The following day, the bill was signed into law by the Governor.

II. Significant Provisions

Outlined below are some of the more important provisions of the Lottery Act. These include the governance, initiation, and specifics of operating the lottery.

A. The Department and Its Governance

Based upon its evaluation of other states, the House consistently held to the view that the lottery should be operated by an independent state agency. This view was shared by the Senate. The only issue was whether the state had already attained the constitutional limit of twenty-five departments within the Executive Branch. Once satisfied that there was at least room for one more


27. The House conferees were Reps. Chris Meffert; Ron Silver, Dem., North Miami Beach; Winston "Bud" Gardner, Dem., Titusville; and T.K. Wetherell, Dem., Daytona Beach. FLA. H.R. JOUR. 698 (Reg. Sess. 1987). The Senate Conferees were Sens. Ander Crenshaw; Dempsey Barron, Dem., Panama City; Curtis Peterson, Dem., Lakeland; and Karen Thurman, Dem., Dunnellon. FLA. S. JOUR. 450 (Reg. Sess. 1987).


30. Of the 22 states then operating a lottery, 13 created an independent state agency: Arizona, California, Illinois, Iowa, Maine, Maryland, New Hampshire, Ohio, Oregon, Rhode Island, Vermont, Washington, and West Virginia. In those states which incorporated the lottery agency within an existing state agency, nearly all chose the equivalent of the Florida Department of Revenue. FINAL SENATE REPORT, supra note 21, at 39.

31. Id. at 24.

32. FLA. CONST. art. IV, § 6.
department, the House and Senate Committees turned their attention to matters of governance.

The House position, requiring Cabinet approval of the Governor's selection of the lottery secretary and allowing the Speaker of the House of Representatives and President of the Senate each to appoint two members of the five-member State Lottery Commission, was vigorously opposed by the Governor, who favored the Senate position. The Senate bill provided for Senate confirmation of the appointment of the lottery secretary and gave the Governor sole power over the selection of the State Lottery Council. Except for its designation as a commission, the Legislature

33. In addition to the 22 departments specified in section 20.10-.315 (1985), Florida Statutes, the Attorney General has opined that both the Department of Military Affairs and the Board of Trustees of the Internal Improvement Trust Fund constitute departments for purposes of the Florida Constitution, article IV, section 6. 1972 Fla. Att'y Gen. Ann. Rep. 254, rendered May 8, 1972. The continued departmental status of the Board of Trustees of the Internal Improvement Trust Fund has been brought into serious question by the enactment of Ch. 75-22, 1975 Fla. Laws 42, wherein the Trustees were merged into the Department of Natural Resources and some powers and duties were transferred to the Department of Natural Resources and the Department of Environmental Regulation.

34. While the new head of the Department was continuously referred to as the Lottery Director, both bills adhered to the term "secretary" as defined in section 20.03 (1985), Florida Statutes. Not all have found this title appropriate, some preferring "Lord of the Long Odds or Great Suzerain of Suckerdom." Namesmanship, Editorial, Tampa Tribune, June 17, 1987, at 10A, col. 1.

35. The Governor's concern transcended the lottery bill in that he foresaw the possibility for similar intrusion into his control over the appointment of officers within other executive agencies. In fact, the Governor threatened to veto the lottery legislation if it diluted his control over the appointment of the secretary and the commission. Martinez affirms stand on lottery commission, Gainesville Sun, Mar. 14, 1987, at 313, col. 5. Actually, he had also been particularly upset with the Senate bill before it passed the Select Committee on the Lottery, labeling as "disastrous" a provision allowing legislative leaders to each appoint three members, including a member of each house of the Legislature, to a nine-member council. Senators: Legislators Deserve Lottery Role, Orlando Sentinel, Mar. 3, 1987, at C1, col. 1. However, before its submission to the Senate Commerce Committee, the Senate Bill was amended to give the Governor the power he desired. Fla. CS for SBs 400, 328, and 12 (1987).

adopted the Senate Lottery Commission\textsuperscript{37} and the Senate position on the selection of the lottery secretary.\textsuperscript{38}

\section*{B. Initiation of Games}

Probably the next greatest area of controversy involved the issue of when to require the Department to initiate the sale of lottery tickets.\textsuperscript{39} The House position was that the games should begin as soon as practicable and that deadlines should be imposed to ensure this result.\textsuperscript{40} A January 1, 1988 date was set for the initiation of

\footnotesize{37.} Significantly, both the House and Senate bills created an advisory body rather than providing it with any power either to approve or disapprove rules, contracts, or other activities of the department. \textit{Compare} Fla. CS for CS for HB 1247, § 6 (1987) (First Engrossed) \textit{with} Fla. CS for CS for SBs 400, 328, and 12, § 7 (1987) (First Engrossed). As specified in the Lottery Act, the Commission will serve as a resource to the Department and provide “private-sector perspectives on the operation of a large marketing enterprise.” Ch. 87-65, § 5, 1987 Fla. Laws 239, 243 (to be codified at FLA. STAT. § 24.106). This is unusual among jurisdictions operating a lottery. Most give some power to the collegial body which either heads or is related to the lottery agency. Nonetheless, Florida chose to focus responsibility upon the secretary for the Department. Early indications suggest that the Commission, which consists of Bob Morrison (Chairman), Louis Frey, Nancy Rhodes, Fransisco Figueredo, and David Eller, is unhappy with its role and would like to have greater power. \textit{Panelists Want Conservative Ads for State Lottery}, Tampa Tribune, Oct. 9, 1987 at 1B, col. 4.

\footnotesize{38.} A comparatively minor issue that generated a great deal of press involved the compensation of the secretary. The House position from the start was that as head of a major “business enterprise” the secretary should be adequately compensated, but not more than any other state officer. Because the Chancellor of the State University System was then the highest paid officer, language was inserted in the House Bill which set as a cap the compensation paid to the Chancellor. Fla. CS for CS for HB 1247, § 4 (1987) (First Engrossed). The Senate position, which prevailed, specified that the compensation be set by Executive Order of the Governor. Ch. 87-65, § 4, 1987 Fla. Laws 239, 242 (to be codified at FLA. STAT. §§ 20.317, 24.104). As it happens, the actual salary of the new Secretary of the Lottery, as negotiated by Lt. Governor Bobby Brantley, is just below that of the Chancellor, unless the Secretary also qualifies for a $10,000 raise by meeting the January 15, 1988, deadline. Fla. Exec. Order No. 87-127 (August 15, 1987). The controversy over the Secretary’s salary is expected to continue as legislation has been filed for the 1988 session which would prohibit the Secretary’s salary and that of any employee of the Department from exceeding the salary of a member of the Cabinet. This bill, if enacted, would reduce the salary of both the Secretary and the Assistant Secretary of the Department. Fla. HB 31 (1988).

\footnotesize{39.} Until the Senate Appropriations Committee included an April 1, 1988 start-up date, the issue between the two Houses was \textit{whether} to impose a deadline, since the Senate had theretofore followed the Governor’s view that the decision should be left up to the sound business judgment of the Department. The Senate position would also allow the Department to decide what type of games with which to begin the lottery. \textit{Compare} Fla. CS for CS for SBs 400, 328, and 12, § 13(1) (1987) \textit{with} Fla. CS for SBs 400, 328, and 12, § 12(1) (1987).

\footnotesize{40.} Start-up deadlines are unusual and have not always been met. The Oregon constitutional provision authorizing a state lottery mandated the initiation of sales of lottery tickets within 105 days after Senate confirmation of the Lottery Director and at least three of the five Lottery Commissioners. Or. Const. art. XV, § 4. The deadline was met with a few days
instant games,\textsuperscript{41} to be shortly followed by on-line games.\textsuperscript{42} The selection of the January 1 date set into motion a series of events which ensured its inclusion in the final bill despite vigorous opposition from the Governor and the Senate.\textsuperscript{43} By conference, the important question was what dates would ensure sufficient revenue for education to defray the appropriations included in the General Appropriations Act being developed in the Appropriations Committees. Once the Revenue Estimating Conference determined that a January 15 date would generate sufficient revenues if followed by a May 1 deadline for on-line games, a compromise was assured.\textsuperscript{44} Nevertheless, the Legislature adopted language from the Senate bill which allows the secretary to request the Governor to declare an emergency if initiation of sales by the deadline was "clearly contrary to the integrity of the state . . . ."\textsuperscript{45} The Department is then required to initiate sales at "the earliest feasible date after the abatement of such state of emergency."\textsuperscript{46}

Closely aligned to this issue was whether to specify the type of game with which to begin. The House position was that the lottery
to spare. The California lottery act mandated the initiation of sales within 135 days after the effective date of the act. \textit{Cal. Code} § 8880.25 (1985). Due primarily to a five-month delay in the appointment of the Lottery Director, actual sales did not commence for nearly a year.

41. The "instant games" use tickets which contain an opaque covered space which the player scratches off to reveal whether he has won a prize and the amount of the prize. \textit{PUBLIC GAMING RESEARCH INSTITUTE INC., HANDBOOK OF U.S. LOTTERY FUNDAMENTALS} 101 (1987).

42. "On-line games" include lotto and numbers games, and require the player to select numbers at a clerk-operated computer terminal, which selection is then recorded in the computer. The player learns at a subsequent drawing conducted by the Department whether the numbers he has chosen entitle him to a prize and, if so, the amount of the prize. "Lotto" is a game by which the player selects six numbers from a field which typically ranges from 1-30 to 1-49. Players usually win some prize if they correctly match at least four of the numbers drawn in any order. A correct match of all six numbers usually results in a substantial prize. "Numbers" games resemble illegal numbers games and require the player to select three or four numbers from a field of nine. \textit{Id.} at 87.


44. The Revenue Estimating Conference projects $144.7 million in revenues for education based upon the deadlines established in the Lottery Act. \textit{Florida's Fiscal Analysis in Brief at 150} (1987) (prepared jointly by the Appropriations Committees of the Senate and House of Representatives).


46. \textit{Id.}
should begin with instant games, to be followed by on-line games. While the Senate preferred to allow the Department to decide, the House position prevailed.

C. Allocation of Revenues

Another area of significant disagreement between the two houses involved the allocation revenues among the categories of prizes, administrative expenses, and net proceeds for education. Following its review of other states, the House consistently favored mandating at least 50% of revenues to be returned to the public as prizes and limiting administrative expenses of the Department to no more than 15%. In reaction to concerns expressed that the 15% limit was too low for the first year, the House bill was amended to allow the Department to borrow start-up funds by inter-trust fund transfer and to have until June 30, 1988, to repay them.

47. The rationale for beginning with instant games includes the following: if one believes that lottery ticket sales should begin as quickly as possible, instant games make more sense because they do not require expensive computer equipment for retailer networking and they are easier for the public and retailers to understand. An additional consideration is that every state that has the choice of beginning with instant or on-line games has begun with instant games. Industry experience supported the House position. A good discussion of the relative merits of beginning with instant or on-line games appears in PUBLIC GAMING RESEARCH INSTITUTE INC., HANDBOOK OF U.S. LOTTERY FUNDAMENTALS 135-39 (1987).


49. Interestingly, despite early indications by Governor Bob Martinez that he might favor using those revenues to meet other needs of the state, the issue of whether lottery revenues would be spent for some purpose other than education was never seriously raised. Lottery bill reaction: not bad for starters, Orlando Sentinel, Feb. 12, 1987, at DI, col. 1. While one unsuccessful attempt was made in the House Committee on Finance and Tax to divert a small portion of revenues to study compulsive gamblers, more attention was directed toward whether lottery revenues would supplement existing revenues. The intent that lottery proceeds supplement those revenues is expressed in the Lottery Act. Ch. 87-65, § 2, 1987 Fla. Laws 239, 240 (to be codified at FLA. STAT. § 24.102).

50. Of the 22 lottery states then in existence, 19 impose a minimum percentage limit on the allocation of revenues for prizes although New Hampshire only applies the limit to lotto games and New York imposes different limits for different types of games. Eight states impose a minimum percentage of revenues for public purposes and three states impose a maximum limitation upon administrative expenses. Fla. H.R. Comm. on Reg'd Indus. & Lic., telephone survey results (on file with committee). See also FINAL SENATE REPORT, supra note 21, at 33.

51. Fla. CS for CS for HB 1247, § 19 (1987) (First Engrossed). The limitations were included in the initial workshop draft which was discussed by the Subcommittee on Pari-Mutuels and the Lottery during its meeting on February 11, 1987.

52. See FLA. STAT. § 215.18 (1985) which provides a mechanism whereby monies may be temporarily transferred from one trust fund to another whenever a deficiency exists in a particular trust fund.

The Senate position favored greater flexibility regarding administrative expenses by merely imposing upon the Department a goal of returning at least 35% of gross revenues for education.\(^\text{54}\) The Legislature essentially adopted the House position by mandating that at least 35% of revenues be deposited in the Educational Enhancement Trust Fund, effectively limiting administrative expenses to 15%.\(^\text{55}\) This was accompanied by a provision which allows the Department to delay repayment of inter-trust fund transfers for up to eighteen months beyond June 30, 1988, if repayment would cause the department to exceed the 15% limit.\(^\text{56}\)

**D. Administrative Procedures**

When investigating Florida law applicable to all state agencies to determine whether the law might impair or impede the efficient operation of a lottery, the staff paid particular attention to the Administrative Procedure Act (APA).\(^\text{57}\) While the effect of the APA on personnel matters was important, particular attention was directed toward rulemaking and contracting decisions.

Total exemption from the rulemaking provisions of the APA was determined to be unnecessary, so long as emergency rule provisions could be adapted to the Department's needs.\(^\text{58}\) Contracting decisions posed a greater problem.

The House position favored total exemption from the APA regarding actions taken by the Department in contracting with vendors or retailers.\(^\text{59}\) The rationale was that these business decisions should be handled like those of businesses in the private sector, and that the APA might otherwise impair or impede the Department in its implementation of the lottery.

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\(^{54}\) Fla. CS for CS for SBs 400, 328, and 12, § 30 (1987) (First Engrossed). The Senate concern, supported by the Governor, was that the 15% percent limit would be too low for the Department in its initial years and would actually harm the effective operation of the lottery.

\(^{55}\) Ch. 87-65, § 21, 1987 Fla. Laws 239, 259 (to be codified at FLA. STAT. § 24.121).

\(^{56}\) Id. § 24(1).

\(^{57}\) FLA. STAT. ch. 120 (1985).

\(^{58}\) FLA. STAT. § 120.54(9) (1985) authorizes state agencies to adopt emergency rules upon a finding that the rules are necessary to protect the health, safety, and welfare of the public. The maximum duration of emergency rules is 90 days. Both the House and Senate bills created exceptions to these restrictions. Since making a profit was not seen as necessarily involving the public health, safety or welfare, a special finding relating to the needs of the lottery was created. Furthermore, since 90 days were insufficient for the start-up period, the Department was exempted from the 90-day restriction. Ch. 87-65, § 9, 1987 Fla. Laws 239, 249 (to be codified at FLA. STAT. § 24.109).

The Senate had earlier shared this view but rejected it in favor of carving out exceptions in a manner similar to that regarding rulemaking.60 This position, which ultimately prevailed, creates two exceptions to the APA contract bidding process.61 First, formal written protests of any decision, intended decision or action of the Department must be filed within seventy-two hours, rather than thirteen days, of receipt of notice of that decision, intended decision or action. Also, the Department may continue the bid solicitation or contract award process despite the protest “in order to avoid a substantial loss of funding to the state or to avoid substantial disruption of the timetable for any scheduled lottery game,”62 rather than to “avoid an immediate and serious danger to the public health, safety, or welfare.”63

E. Legislative Review of Budget

An important issue raised during the legislative process concerned whether the budget of the Department should be subject to the same review and approval by the Legislature as are the budgets of other state agencies.64 Before the House bill reached the Appropriations Committee, the House had taken the position that the Department should be treated no differently than any other agency in this regard. The Appropriations Committee, however, amended the bill to completely exempt the Department from budget review, reasoning that if the Department was exempt from state laws relating to procurement, personnel, and administrative procedures, there was little reason to subject it to the type of budget analysis generally given state agencies.65 Interestingly, in approving this amendment, the House in effect adopted the position that had earlier been taken by the Senate on this matter. Later, however, the Senate position was reversed when the Senate Appropriations Committee amended the Senate bill to remove the Lottery Department’s exemption from the budget review process.66 At conference,
the original House position and that of the Senate Appropriations Committee prevailed.\textsuperscript{67}

\textbf{F. Personnel}

Early conversations with representatives of other lottery agencies revealed that the task of conducting a lottery was such that normal civil service requirements tended to hamper the agency in responding to changing market conditions.\textsuperscript{68} It was urged that the agency must be given more freedom to hire, fire, transfer, classify, and determine the compensation of its employees than is afforded a typical state agency. Both the House and Senate bills incorporated this philosophy, as did the final version of the Act.\textsuperscript{69}

\textbf{G. Procurement}

Another area of particular concern was whether, and to what extent, the Department of the Lottery should be exempt from laws relating to the procurement of goods and services by state agencies.\textsuperscript{70} There were no significant differences between the House and Senate bills with regard to how this issue should be resolved.

The Act gives the Department of the Lottery three options in procuring goods and services. It may choose to comply with all provisions applicable to other state agencies by not exercising its other

\textsuperscript{67} Ch. 87-65, § 20, 1987 Fla. Laws 239, 258 (to be codified at Fla. Stat. § 24.120).

\textsuperscript{68} Results of telephone survey with other states (conducted by committee staff) (on file with committee). This was also a lesson learned from an early analysis of the California lottery which proved useful in the preparation of the House committee's initial working draft. See State Seeks Winning Ticket for New Lottery, Miami Herald, Jan. 4, 1987, at 1A, col. 1 (first of a four-part series).

\textsuperscript{69} Officers and employees of the Department are exempt from the Career Service System provided in sections 110.201-233, Florida Statutes (1985), and personnel actions of the Department are exempt from the APA. However, various conflict of interest provisions apply to such officers and employees, and they and their immediate families are unable to play lottery games. Ch. 87-65, §§ 6, 26, 1987 Fla. Laws 239, 246, 257 (to be codified at Fla. Stat. § 24.105, .116). The Department has adopted personnel rules pursuant to its emergency rulemaking authority. 13 Fla. Admin. W. 3661 (Sept. 25, 1987).

\textsuperscript{70} The primary provisions governing procurement by agencies are in the 1985 Florida Statutes: section 255 (public property and publicly owned buildings), section 273 (state-owned tangible personal property), section 281 (safety and security services for state property), section 283 (public printing and stationary), or section 287 (procurement of personal property and services). The Department of the Lottery is entirely exempt from several provisions including: section 946, relating to the correctional work program, so that it need not purchase goods and services from the program; section 282, relating to communication and data processing, so that it is more free to develop its own network; and section 283.315, relating to publications, so that it need not print the cost of publication on every lottery ticket.
options. It may seek to expedite the process by exercising functions or granting approvals to itself which are provided to other agencies such as the Department of General Services. Finally, it may exempt itself from these provisions by adopting alternative procurement procedures.\textsuperscript{71} To date, the Department of the Lottery has opted for its own procedures.\textsuperscript{72}

\section*{H. Vendors}

Lotteries cannot be efficiently and economically operated without the purchase of significant goods and services from vendors.\textsuperscript{73} This is especially true in major procurement areas such as advertising, instant ticket printing, distribution, and redemption procedures, on-line game design and networking, and security. Because in a large lottery operation such as Florida’s, the contracts can be extremely valuable, and because of the importance of security and integrity of the operation of the lottery, both the House and Senate chose to follow the trend in newer lottery states of imposing strict financial disclosure requirements upon vendors.\textsuperscript{76} The Lottery Act also imposes a tough bond requirement upon major pro-

\textsuperscript{71} Ch. 87-65, § 6, 1987 Fla. Laws 239, 245 (to be codified at FLA. STAT. § 24.105(15)).

\textsuperscript{72} The Department has adopted procurement rules pursuant to its emergency rulemaking authority. 13 Fla. Admin. W. 3675 (Sept. 25, 1987).

\textsuperscript{73} A “vendor” is defined to be “any person who provides or proposes to provide goods or services to the department, but does not include an employee of the department, a retailer, or a state agency.” Ch. 87-65, § 3, 1987 Fla. Laws 239, 241 (to be codified at FLA. STAT. § 24.103).

\textsuperscript{74} The term “major procurement” is defined to mean:

\begin{enumerate}
\item a procurement for a contract for the printing of tickets for use in any lottery game, consultation services for the start-up of the lottery, any goods and services relating to marketing and promotion, any goods or services involving the official recording for lottery game involving player selections, any goods or services involving the receiving of a player’s selection directly from a player in any lottery game involving player selections, any good or services involving the drawing, determination, or generation of winners in any lottery game, or the security report service provided for in this act.
\end{enumerate}

\textit{Id.}

\textsuperscript{75} Ch. 87-65, § 11, 1987 Fla. Laws 239, 250 (to be codified at FLA. STAT. § 24.111(2)). The disclosure requirements are similar to those imposed in California, but without the requirements upon corporate officers which had caused several vendors to decline to seek major lottery contracts. The Florida Lottery Act was thus written so as to not hinder the Department in obtaining the best contract from an open field of potential vendors.
curement vendors and declares vendors with certain criminal records to be ineligible.

I. Retailers

While other state departments rely upon business establishments to collect various taxes such as the sales tax, and even provide those establishments with compensation in the form of a credit for doing so, the Department of the Lottery must rely upon retailers to actually promote the sales of lottery tickets. Critical to the successful operation of the lottery is that the retailers must be financially responsible, attentive to security considerations, accessible to the public, and, hopefully, eager to sell lottery tickets.

Both the House and Senate heeded early advice that the Department contract with, rather than license, retailers. Contracts are easier to suspend or cancel for cause, and eliminate bureaucratic headaches attendant to rights created by licensure. The trend among the newer lottery states is to favor contracts.

Other issues related to retailers included their compensation, eligibility, selection, accessibility to the handicapped, and bond-

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76. Major procurement vendors must post a bond with the Department “in an amount equal to the full amount estimated to be paid annually to the vendor under the contract.” Ch 87-65, § 11, 1987 Fla. Laws 239, 251 (to be codified at FLA. STAT. § 24.111(4)). In lieu of a bond, the vendor may file securities meeting specified qualifications. Id.

77. As with lottery employees and retailers, vendors cannot have been convicted or cannot have pled guilty or nolo contendere to a felony within the preceding 10 years, regardless of adjudication, unless the vendor has been pardoned, has since engaged in law-abiding commerce and good citizenship, or, if a business entity, has terminated its relationship with the individual whose actions directly contributed to the vendor’s conviction or plea. Id. § 11, 1987 Fla. Laws 239, 251 (to be codified at FLA. STAT. § 24.111(3)).

78. FLA. STAT. § 212.12(1) (Supp. 1986).

79. The term “retailer” is defined in the Lottery Act as “a person who sells lottery tickets on behalf of the department pursuant to a contract.” Ch. 87-65, § 3, 1987 Fla. Laws 239, 241 (to be codified at FLA. STAT. § 24.103(6)).

80. Two relatively new lottery states, California, CAL. CODE § 8880.25 (1985), and Oregon, OR. REV. STAT. § 461.430 (1985) contract with retailers.

81. The Legislature adopted the Senate position of allowing the Department to determine the compensation to be paid retailers. Ch. 87-65, § 6, 1987 Fla. Laws 239, 245 (to be codified at FLA. STAT. § 24.105). The House had favored specifying a maximum compensation of 5% of the ticket retail price plus an incentive bonus of up to 1%. Of the states then operating a lottery, the majority allowed the compensation to be set by rule.

82. Certain persons are precluded from serving as retailers: persons under 18 years of age, persons who would be engaged exclusively in the sale of lottery tickets, and persons who had been convicted of or pled guilty or nolo contendere to a felony in the past 10 years. Ch. 87-65, § 12, 1987 Fla. Laws 239, 252 (to be codified at FLA. STAT. § 24.112). Most lottery laws prohibit persons from engaging in the exclusive sale of lottery tickets, it being the view
ing requirements. Concern about large businesses with multiple locations having an advantage over small businesses led the Legislature to include a provision requiring a separate contract for each retail location.

**J. Minority Business**

Because minority business participation in lottery business was important to many legislators, the Lottery Act requires that at least 15% of the vendors and retailers be minority business enterprises, provided that no more than 35% of them are of the same minority. There are two noteworthy aspects of this section.

The language as enacted is essentially the House version. However, the Conference Committee clarified the intent with respect to the 15% requirement that it apply to the "total number of all retailers and vendors taken together." The other aspect is that, unlike other state agencies, the Department of the Lottery must set aside a minimum percentage of its lottery business for minority business enterprises. Other state

that such persons might project an unhealthy image and that they provide less security and financial responsibility than an on-going business.

83. Concern expressed on the floor of the Senate during initial debate of Fla. CS for CS for SBs 400, 328, and 12 (1987) that the Department might arbitrarily limit the number of retailers or succumb to political favoritism led the Senate, and ultimately the Legislature, to adopt language designed to prohibit such contemplated abuses. Ch. 87-65, § 12, 1987 Fla. Laws 239, 252 (to be codified at FLA. STAT. § 24.112).

84. Unlike vendors, for whom bonding requirements are mandatory, retailers may be required by the Department to meet bonding requirements. For its protection, the Department is authorized to impose a bond requirement upon retailers. However, even if a bond requirement is imposed, small retailers are afforded protections in that the amount of the bond is limited, the retailer may deposit securities in lieu of the bond, and the Department may purchase blanket bonds covering all or selected retailers. Id.

85. Id.

86. Ch. 87-65, § 13, 1987 Fla. Laws 239, 254 (to be codified at FLA. STAT. § 24.113).

87. The Senate provision was identical except that it did not apply to vendors. Fla CS for CS for SBs 400, 328, and 12, § 18 (1987).

88. The language in both the House and Senate bills requiring 15% of all retailers and vendors did not mean 15% of each category. This section has been recently criticized by the Chairman of the State Lottery Commission as "deceptive" in that it provides for 15% of lottery contracts to minority business enterprises rather than 15% of revenue for such contracts. Tampa Tribune, Oct. 8, 1987, at 2, col. 2.

89. This is an exception to the overall intent of the Lottery Act that the Department of the Lottery will be given greater latitude than other state agencies in its operation. See for example, the discussion of the provision relating to procurement and personnel. The Department has included within its emergency procurement rules provisions which establish a Minority Business Enterprise Utilization Plan. 13 Fla. Admin. W. 53 (1987) (ER 87-19). As currently written, that rule gives the erroneous impression, however, that the 15% requirement is a goal.
agencies are only encouraged to spend 15% of their moneys for commodities, contractual services, and construction each year for the purpose of contracting with minority business enterprises.90

III. Other Provisions of Interest

Many of the provisions discussed below, while of interest, are peripheral to the daily operation of the lottery.

A. Advertising

Lottery advertising constitutes a source of controversy when perceived as directed at the poor.91 The Lottery Act deals little with this issue except insofar as it requires such advertising to "be consistent with the dignity and integrity of the state."92 Thankfully, the Lottery Act did not repeat the experience of Missouri, whose advertising restrictions are crippling the lottery's success.93

B. Assignment of Prizes

Most lottery acts prohibit a person from assigning his right to a prize, except that a prize may be paid to the estate of the deceased winner or to another person pursuant to court order. In addition to these exceptions, the House, and ultimately the Legislature, added a provision whereby a person may assign up to 50% of his prize to a bank, savings association, or credit union having its principal place of business in Florida.94 The Lottery Act also imposes crimi-

91. The Florida House of Representatives Committee on Regulated Industries and Licensing reviewed a series of lottery commercials from other states, which met with favor, excepting those which seemed to play upon the guilt of the citizenry for not doing their part to aid education. Fla. H.R. Comm. on Reg'd Indus. & Lic., tape recording of proceedings (Mar. 16, 1987) (on file with committee). Moreover, a great deal of attention, including that of the State Lottery Commission, has been directed recently at commercials which are viewed as preying upon the poor.
93. Missouri has experienced poor results in the sale of lottery tickets due in large part to the provisions of an amendment to its constitution relating to lottery advertising. Not only is the content of lottery advertisements limited to certain statistical data, such as the location of sales, ticket price, and prize structure, but each advertisement must specify that it "is not designed to induce persons to participate in the Missouri state lottery." Mo. Const. art. III, § 39.
94. This language, which was intended to help a lottery winner maximize his options, may have previously unforeseen adverse federal income tax implications. The Department of the Lottery has sought a determination of whether this provision will trigger the constructive receipt doctrine, thus subjecting the entire prize to treatment as gross income of
nal penalties upon persons who induce another to assign his right to claim a prize.\textsuperscript{95}

\section*{C. Auditing}

Concern for the integrity of the lottery led the Legislature to be especially conscious of the need for extensive auditing of the Department. Consequently, in addition to establishing its own system of internal audits,\textsuperscript{96} the Department is subject to two external audits. The Legislative Auditing Committee is required to retain an independent certified public accountant to conduct an annual financial audit.\textsuperscript{97} Moreover, the Auditor General is authorized at any time to audit any phase of the operations of the state lottery.\textsuperscript{98}

\section*{D. Corporate Name}

While both the House and Senate bills had prohibited any person from the unauthorized use of the terms such as “Florida Lottery,”\textsuperscript{99} it came to the attention of the Governor’s office after it had received pre-start-up funding,\textsuperscript{100} that several corporations had already begun to incorporate the word “lottery” into their corporate names in a manner which might cause confusion with the Department of the Lottery.\textsuperscript{101} Accordingly, the Senate bill, and ultimately the Legislature, included a provision which specifically prohibits the use of “lottery” in a corporate name. Moreover, the

\footnotesize{the winner, even though it is to be paid over a period of years. Letter from Tom Bell, General Counsel, to the Internal Revenue Service (Nov. 3, 1987).

\textsuperscript{95} This provision was designed to keep people from preying upon unsophisticated lottery winners and also imposes criminal penalties upon persons who offer to sell their right to a prize or who offer, for compensation, to claim the prize of another. Ch. 87-65, § 18, 1987 Fla. Laws 239, 258 (to be codified at Fla. Stat. § 24.118(2)).

\textsuperscript{96} Ch. 87-65, § 6, 1987 Fla. Laws 239, 244 (to be codified at Fla. Stat. § 24.105(6)).

\textsuperscript{97} This independence was underscored by the requirement that the accountant have “no financial interest in any vendor with whom the department is under contract.” Id. § 23, 1987 Fla. Laws 239, 261 (to be codified at Fla. Stat. § 24.123).

\textsuperscript{98} Id.

\textsuperscript{99} Ch. 87-65, § 18, 1987 Fla. Laws 239, 258 (to be codified at Fla. Stat. § 24.118(5)).

\textsuperscript{100} During the session, it became apparent to the Governor and the Legislature that preliminary start-up preparations could begin prior to enactment of the Lottery Act, thus facilitating the ability of the Department of the Lottery to begin operations as quickly as possible. Accordingly, the Legislature appropriated $500,000 to the Executive Office of the Governor for this purpose, effective April 20, 1987. Ch. 87-3, § 9, 1987 Fla. Laws 261.

\textsuperscript{101} Letter to George Firestone, Secretary of State, from James Hauser, retained counsel to Florida lottery program (May 20, 1987) (on file with committee).}
Department of State is to require compliance by then-existing corporations within six months of the effective date of the Act.\textsuperscript{102}

\textbf{E. Extensions of Credit}

The House and Senate bills disagreed on the issue of whether a person should be able to buy lottery tickets with a credit card. The House position prevailed, thus allowing such sales, although a compromise was reached to tie the sales to those of other goods or services.\textsuperscript{103}

\textbf{F. Multistate Lottery}

Although there is a growing trend in the country to favor multistate lotteries, the House took the position that this was a business decision for the Department to make.\textsuperscript{104} The Senate position was to prohibit the Department from entering into multistate agreements for three years.\textsuperscript{105} A compromise one year ban was enacted.\textsuperscript{106}

\textbf{G. Offset Authority}

An attractive feature of the California lottery is that any sum owed the state by a lottery prize winner is offset against the prize prior to its payment. This concept was incorporated into the House bill and later, in a revised form, into the Senate bill.\textsuperscript{107} The Senate's more comprehensive position prevailed, and included authority to offset child support payments collected through a court.\textsuperscript{108}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{102} Ch. 87-65, § 19, 1987 Fla. Laws 239, 258 (to be codified at FLA. STAT. § 24.119).

\textsuperscript{103} The bill was amended by the Florida House of Representatives Committee on Finance and Taxation to require purchases of lottery tickets from retailers with a credit or charge card to be in addition to the purchase of other goods and services having a cost of no less than $20. This restriction does not, however, apply to credit or charge card purchases directly from the Department, since it is not a retailer. Ch. 87-65, § 18, 1987 Fla. Laws 239, 257 (to be codified at FLA. STAT. § 24.118(1)).

\textsuperscript{104} Fla. CS for CS for HB 1247, § 7 (1987) (First Engrossed).

\textsuperscript{105} Fla. CS for CS for SBs 400, 328, and 12, § 8 (1987) (First Engrossed).

\textsuperscript{106} Ch. 87-65, § 6, 1987 Fla. Laws 239, 246 (to be codified at FLA. STAT. § 24.105(20)).

\textsuperscript{107} The House bill limited the offset authority to debts owed the state by a person claiming a prize of $600 or more. Fla. CS for CS for HB 1247, § 14 (1987) (First Engrossed). This figure was chosen primarily because prizes below $600 need not be paid by the Department, but can be collected directly from a retailer. Ch. 87-65, § 15, 1987 Fla. Laws 239, 256 (to be codified at FLA. STAT. § 24.115(1)).

\textsuperscript{108} Id.
\end{footnotesize}
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H. Pari-mutuel Industry

In reaction to concern that the lottery would create economic hardship upon the pari-mutuel industry and upon pari-mutuel tax revenues, the House bill specifically authorized the Department of the Lottery to use pari-mutuel themes in its games and to base a lottery game upon the result of a horserace, dog race, or jai alai activity. This position prevailed except insofar as language was inserted at conference to clarify that the lottery games must be determined actively by chance.

I. Player-activated Terminals

The House and Senate split over whether to let the Department use player-activated terminals to sell lottery tickets. Concern over use by minors led both the House and Senate to prohibit their use, with the caveat that the Department is directed to study the feasibility of their use in the future.

J. Unlawful Purchases and Sales

While the Lottery Act, like most lottery laws, prohibits minors, vendors, and lottery employees from buying lottery tickets, it also attempts to ensure the integrity of the lottery by prohibiting a retailer, his employees or relatives from purchasing tickets where the retailer is authorized to sell them.

IV. Summary

The Florida Lottery is expected to begin by its start-up deadline and generally is expected by the lottery industry to be one of the top two or three lotteries in the country within a few years. It was

110. Ch. 87-65, § 6, 1987 Fla. Laws 239, 245 (to be codified at Fla. Stat. § 24.105(13)).
111. Player-activated terminals are electronic devices which allow the player to purchase an instant or on-line lottery ticket without the assistance of a retailer. PUBLIC GAMING RESEARCH INSTITUTE INC., HANDBOOK OF U.S. LOTTERY FUNDAMENTALS 237 (1987).
112. Ch. 87-65, § 6, 1987 Fla. Laws 239, 244-55 (to be codified at Fla. Stat. § 24.105(10)-(11)).
113. While the sale of a lottery ticket to a minor or the purchase of a ticket by a minor is prohibited and subject to criminal penalty, the Lottery Act allows a person to make a gift of a ticket to a minor. If the minor wins, the prize is paid to an adult member of the winner's family or his legal guardian. Ch. 87-65, § 15-17, 1987 Fla. Laws 239, 256-57 (to be codified at Fla. Stat. § 24.115(1)(b), .116(1), .117(2)).
115. Id.
the desire of those involved in the creation of the Lottery Act that the law would facilitate the lottery's success while ensuring that it was operated with integrity.

Being involved in the preparation of a bill which imposes a 50% tax\textsuperscript{116} on a commodity, and finding pressure from the citizenry to speed up its imposition, is rare. Hopefully, the lottery will reward both public expectations and Florida's educational system. Then again, hopefully, the author will win.

\textsuperscript{116} When one considers that for every dollar spent on a lottery ticket, 35 cents is retained by the state for education and 15 cents is retained to operate the lottery, a lottery ticket will have, at 50%, the highest tax rate in the state.