



Senate Fiscal Agency
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BILL ANALYSIS



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Senate Bills 461 and 462 (as reported without amendment)
Sponsor: Senator Wayne Schmidt (S.B. 461)
Senate Curtis Hertel, Jr. (S.B. 462)
Committee: Regulatory Reform

Date Completed: 1-9-18

RATIONALE

Fantasy sports are a type of online game where participants compete against other players by drafting a virtual team of real professional athletes of a particular sport. Participants earn points based on the statistical performance of the professional players in real-world games and competitions. While traditional fantasy sports contests are played over the course of an entire season, daily fantasy sports (DFS) contests are conducted each day. The Fantasy Sports Trade Association estimates that more than 1.6 million Michigan residents play some form of fantasy sports. Recently, the legality of DFS has come under scrutiny and several state attorneys general have issued opinions concluding that DFS is an illegal form of gambling under their respective state laws, according to Legal Sports Report ("Attorney General Opinions on Daily Fantasy Sports", 11-1-2017). However, a number of states have enacted laws clarifying the legal status of fantasy sport contests operating in those states, and other states have pending legislation that would address the issue. It has been suggested that Michigan specify in statute that a fantasy sport game is not gambling, as well as enact regulations of the activity, in order to ensure that Michigan residents legally participate in fantasy sports with consumer protections.

CONTENT

Senate Bill 461 would amend the Michigan Penal Code to specify that Chapter 44 (which prohibits certain operations and activities relating to gambling) of the Code would not prohibit certain activities in connection with a contest or game that involved an athletic event satisfying certain conditions, or that was a fantasy or simulation sports game that satisfied certain conditions.

Senate Bill 462 would enact the "Fantasy Sports Games Consumer Protection Act" to do the following:

- Authorize fantasy sports games in the State if they were conducted by a licensed game operator.
- Require a person seeking to be a licensed game operator to submit an application and a fee to the Department of Licensing and Regulatory Affairs (LARA).
- Require a licensed game operator to submit to LARA procedures intended to regulate the operation of a fantasy sports game.
- Require a game operator to ensure that an individual under the age of 18 did not participate in a fantasy sports game.
- Prohibit an operator from conducting fantasy sports game based on a university, college, high school, or youth sporting event.
- Require a licensed game operator to make available means to allow an individual to irrevocably restrict his or her ability to enter a fantasy sports game.
- Require LARA to promulgate rules to implement the Act.

- **Prescribe a civil fine for a violation of the Act, a promulgated rule, or an order of LARA.**

Senate Bill 462 would take effect 90 days after it was enacted. The bill is tie-barred to House Bill 4742 (which is the same as Senate Bill 461).

Senate Bill 461

Chapter 44 of the Michigan Penal Code states that it does not prohibit or make unlawful the operation of a game of skill or chance under the Michigan Exposition and Fairgrounds Authority Act, or any of the following in connection with a race, contest, or game:

- Giving or paying purses, prizes, or premiums to players in a game or participants in a contest; to the owner, driver, manager, or trainer of animals; or to the drivers, mechanics, or operators of a machine.
- Giving or paying entry fees.
- Paying expenses or a reward for services or labor.

Under the bill, Chapter 44 would not prohibit or make unlawful the specified activities in connection with a contest or game under only two sets of circumstances, described below.

First, the "exception" to Chapter 44 would apply if the game or contest involved an athletic event that satisfied all of the following conditions:

- The sponsor or operator of the game or contest was not a player or participant in the game or contest.
- The performance of the player or participant relative to the performance of others was determinative of the outcome.
- The prizes and awards offered to winning participants were established and made known to the participants in advance of the game or contest.

Second, the exception would apply if the game or contest were a fantasy or simulation sports game or contest that satisfied all of the following conditions:

- The value of all prizes and awards offered to winning game participants was established and made known to the game participants in advance of the fantasy game.
- All winning outcomes reflected the relative knowledge and skill of game participants and were determined predominantly by accumulated statistical results of the performance of individuals, including athletes in the case of sporting events.
- A winning outcome was not based on the scope, point spread, or performance of a single team or combination of teams or on any single performance of an individual athlete or player in a single event.

"Athletic event" and "athletic game or contest" would mean a sports activity that involves the physical exertion and skill of one or more players or participants. The terms would not include roulette, poker, blackjack, a card game, a dice game, or any other game or contest ordinarily offered at a gambling casino.

Senate Bill 462

Fantasy Sports Gaming

The proposed Act would authorize fantasy sports games if they were conducted in accordance with the Act by a licensed game operator, or if they were conducted by a game operator who was awaiting issuance or denial of a license.

Any other law that was inconsistent with the proposed Act would not apply to fantasy sports games authorized by the Act.

A game operator that was conducting fantasy sports games in the State on May 1, 2016, could continue operating fantasy sports games until the game operator was issued or denied a license by the Department of Licensing and Regulatory Affairs.

"Fantasy sports game" would mean a fantasy or simulation sports game or contest with an entry fee that meets all of the following conditions:

- The value of all prizes and awards offered to winning game participants is established and made known to the game participants in advance of the game.
- All winning outcomes reflect the relative knowledge and skill of game participants and are determined predominantly by accumulated statistical results of the performance of individuals, including athletes.
- A winning outcome is not based on the score, point spread, or performance of a single team or combination of teams or on any single performance of an individual athlete or player in a single event.

"Game operator" would mean a person that offers a software platform for the playing of a fantasy sports game, administers one or more fantasy sports games with an entry fee, and awards a prize of value.

Game Operator Licensure

A person could not offer fantasy sports games in the State unless the person were a licensed game operator.

A person seeking to be a licensed game operator would have to submit an application, with a fee (described below), to LARA. The applicant would have to provide sufficient documentation to LARA to assure that the applicant met the requirements for licensing, including documentation of all of the following:

- The name of the applicant.
- The location of the applicant's principal place of business.
- The name and address of each person that held a 15% or greater ownership interest in the applicant or in shares of the applicant.
- The applicant's criminal record, if any, or, if the applicant were a business entity, any criminal record of an individual who was a director or officer of or who had a 15% or greater ownership interest in the applicant.
- Any ownership interest that a director, officer, policy-making manager, or principal stockholder of the applicant held in a person that was or had been a licensed fantasy sports operator or similar entity.
- A description of any physical facility operated by the applicant in the State, the employees who worked at the facility, and the nature of the business conducted at the facility.
- Information sufficient to show, as determined by LARA, that the applicant could meet the requirements of procedures submitted by the applicant.

A license would be valid for one year. The Department would have to renew a license each year if the applicant demonstrated continued eligibility for licensure.

The initial license fee would be \$5,000, and the annual license renewal fee would be \$1,000. However, an initial license fee or annual license renewal fee could not exceed 10% of the total amount of entry fees collected by the applicant from the operation of fantasy sports games in the State less the total amount of cash and value of cash equivalents paid as prizes or awards to game participants.

("Person" would mean an individual, partnership, corporation, association, or other legal entity other than a governmental entity. It also would include a sovereign tribal government and its business entities.)

Gaming Procedures

A licensed game operator that offered paid fantasy sports games in the State would have to submit to LARA procedures that were intended to do all of the following:

- Prevent the game operator, its owners, directors, officers, and employees, and any relative of any of those individuals living in the same household, from competing in a fantasy sports game.
- Prevent the employees or agents of the game operator from sharing protected information that could affect fantasy sports game play with third parties until the information was made public.
- Prevent participants and officials in a real-world sporting event that had any effect on the outcome of a fantasy sports game from participating in the fantasy sports game.
- Disclose the number of fantasy sports games a single game participant could enter and take reasonable steps to prevent game participants from entering more than the allowable number of fantasy sports games.
- Either segregate game participants' money from operational money, or maintain a reserve in the form of cash, cash equivalents, security deposits held by banks and processors, an irrevocable letter of credit, a bond, or a combination of these in the total amount of deposits in game participants' accounts for the benefit and protection of authorized game participants' money held in fantasy sports game accounts.

("Protected information" would mean information related to the playing of paid fantasy sports games by game participants that is obtained solely as a result of an individual's employment with or work as an agent for a game operator.)

A person would be prohibited from violating a procedure that was submitted to LARA and approved the Department.

Procedures submitted to LARA would be confidential and privileged, would not be subject to disclosure under the Freedom of Information Act, would not be subject to subpoena, and would not be subject to discovery or admissible in evidence in a private civil action.

Operator Restrictions & Requirements

A game operator would have to undertake commercially reasonable procedures intended to ensure that an individual under 18 years of age did not participate in a fantasy sports game.

A licensed game operator could not conduct, operate, or offer a fantasy sports game that was based on a university, college, high school, or youth sporting event.

A licensed game operator would have to make available on the operator's website information about resources relating to compulsive behavior, including a telephone number or link to information on compulsive behavior and where to seek assistance for compulsive behavior.

A licensed game operator would have to make available, by website, telephone, or online chat, a means to allow an individual to irrevocably restrict his or her ability to enter a fantasy sports game and to select the length of time the restriction would be in effect.

A licensed game operator would have to offer a game participant access to the participant's playing history, including a summary of entry fees spent, games played, previous lineups, and prizes awarded.

Sanctions

The Department could suspend, revoke, or restrict the license of a game operator that violated the Act, a rule promulgated under the Act, or an order of LARA.

The Department could impose a civil fine of up to \$1,000 for such a violation. The fine would be payable to the State and could be recovered in a civil action brought by the Department.

Audit

By July 1 of each year, a licensed game operator would have to submit to LARA an audit of financial condition of the operator's total operations for the previous calendar year. An audit would have to be conducted by a certified public accountant in accordance with generally accepted auditing standards. An audit submitted to LARA would be confidential and privileged, would not be subject to disclosure under the Freedom of Information Act, would not be subject to subpoena, and would not be subject to discovery or admissible in evidence in a private civil action.

MCL 750.310 (S.B. 461)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills would provide legal and business certainty to the growing industry of fantasy sports in Michigan. Recently, there has been debate across the country about whether fantasy sports contests should be considered "gambling". The bills would eliminate that "gray" area in Michigan law by classifying fantasy sports as games of skill and codifying their status as a nongambling activity. Unlike traditional casino-style gambling games, such as poker, blackjack, and craps, which require a systematic element of chance, fantasy games require research, strategy, and analysis in picking the right lineup and preparing for a draft. Fantasy sports are based on individual players' statistics and are not outcome determinative, unlike horse racing or sports betting, so there is less of a chance of corruption. Major professional sports leagues, such as the National Football League, Major League Baseball, the National Basketball Association, the National Hockey League, Major League Soccer, and NASCAR, have all agreed that fantasy sports are not gambling.

Supporting Argument

The bills would implement consumer protections to help ensure participants that their money was protected, the games were fair, and the fantasy sport companies were operating contests in a transparent and trustworthy manner. These protections would give the fantasy sports industry the stability to grow and innovate in Michigan.

Response: This is a minimalist approach to consumer protection that leaves several issues to be considered. First, the bills would not provide sufficient protections for individuals who participate in fantasy sport contests. The penalties and sanctions, particularly for violations of the proposed Fantasy Sports Games Consumer Protection Act, should be increased, and there should be more specificity as to what actually would constitute a violation of the Act. Another consideration is whether operators should participate in funding addiction assistance resources, since fantasy sports activities may be addictive. The Detroit casinos, horse racing revenue, and the lottery all participate in funding such programs. Additionally, consideration also should be given to whether the State should receive any of the revenue, other than the licensing fee, from fantasy sport operators, which occurs in several other states. If fantasy sport contests would not be subject to the same State taxation as casino gambling, fantasy sports companies should have to pay for the costs of their licensing and regulation.

Opposing Argument

The Michigan Gaming Control Board, rather than LARA, would be the best agency to oversee fantasy sports in the State. The Board has the expertise and experience to maintain the integrity of fantasy gaming, and to ensure that Michigan residents would be protected while they participated in these types of contests. Many fantasy sport contest operators may be part of a larger enterprise and the Board has the expertise to deal with out-of-State companies and complex corporate structures. Several states that have legalized fantasy sports have vested oversight in their gaming commission or gaming board.

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

Senate Bill 461

The bill would have no fiscal impact on the State and could have a positive fiscal impact on local government. It is unknown under which provisions of the Michigan Penal Code a fantasy sports game would be prosecuted absent the exception in the bill, but most violations related to gambling are misdemeanors punishable by imprisonment for up to one year or a fine of up to \$1,000. Any reduction in misdemeanor arrests and convictions could reduce resource demands on law enforcement, court systems, community supervision, and jails. Any associated decrease in fine revenue would reduce funding to public libraries.

Senate Bill 462

The bill would have no fiscal impact on local government. The bill would have a negligible or possibly small negative fiscal impact on State government. The Department of Licensing and Regulatory Affairs would be required to promulgate rules to implement the provisions of the bill. The Department also could incur additional expenses creating and reviewing the application forms, reviewing the audit documents required under the bill, and enforcing the prohibitions. It is possible that most of these expenses would be covered by the licensing fees or absorbed by LARA. The license fees would be \$5,000 for the first year, and \$1,000 for each renewal year, but would be capped at 10% of entry fees less cash and prizes paid out by the game operator. According to the Federal Trade Commission, two industry providers control over 95% of the market in regard to fantasy sports gaming entry fees. As many as a dozen additional providers could apply for a license, as has happened recently in Indiana and Mississippi; however, fees from those providers would more likely be capped under the bill. After the initial licensing fees were paid in the first year, LARA could be required to regulate the industry within the State with as little as \$2,000 in new revenue each year.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.