

# Legislative Analysis



## VIOLENT AND SEXUALLY EXPLICIT VIDEO GAMES

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**Senate Bill 416 (Substitute H-1)**  
**Sponsor: Sen. Alan L. Cropsey**

**Senate Bill 463 (Substitute H-2)**  
**Sponsor: Sen. Gerald Van Woerkom**  
**House Committee: Judiciary**  
**Senate Committee: Judiciary**

### First Analysis (8-30-05)

**BRIEF SUMMARY:** Senate Bill 416 would prohibit knowingly disseminating to a minor an ultra-violent explicit video game, create a civil penalty for a violation, and create an affirmative defense for a person who acted in good faith. Senate Bill 463 would add video games to the obscenity laws.

**FISCAL IMPACT:** The bills would have an indeterminate fiscal impact on the state and local units of government, depending on how they affected numbers of and sentences for people held responsible for state civil infractions, found guilty of misdemeanors, or found guilty of felonies. Depending on circumstances, offenders sentenced for criminal offenses may receive probation, a period of incarceration, a fine, or some combination thereof. The following table shows how the revenues and costs of various penalties would affect the state and local units of government.

| Responsible for/Guilty of:    | Fine             | Court-ordered Costs ("Minimum State Costs") | Costs of Incarceration   | Costs of Probation Supervision  |
|-------------------------------|------------------|---|--|---|
| <b>State Civil Infraction</b> | To local library | \$10 to state Justice System Fund           | Not applicable   | Not applicable  |
| <b>Misdemeanor</b>            | To local library | \$40 to state Justice System Fund           | Local costs of incarceration in county jail; costs vary by county  | Local.  |
| <b>Felony</b>                 | To local library | \$60 to state Justice System Fund           | Can be sentenced to jail or state prison. State prison: average appropriated FY 2004-05 cost of approximately \$29,000 per prisoner per year. Actual cost varies by location and security level. | State. Average FY 2004-05 cost of parole and probation supervision of \$5.42 per offender per day, or \$1,977 annually. |

### THE APPARENT PROBLEM:

Some video games contain violent and/or sexually explicit images that are not suitable for young children. Though some studies reveal benefits to game players such as increased eye-hand coordination and better spatial and visual skills, other studies have noted increased aggression in behavior in children and adults who played violent video

games. Along with the concern over the long-term effects on children and adolescents of violent video games there is a growing concern regarding nudity and lewd acts portrayed in some games.

Most if not all video games are rated based on the suitability of the content for different age groups. A game rated M for Mature, according to the rating system by the Entertainment Software Rating Board (ESRB), may be suitable for persons ages 17 or older; M-rated games may contain mature sexual themes which can include mild to moderate sexual references and/or depictions – including partial nudity. The Adults Only (AO) rating by the ESRB (and ratings such as an NC-17 by other organizations) are suitable only for adults and contain graphic depictions of sex and/or violence.

Parents can use the ratings to decide whether a particular game is appropriate for their children. However, especially in the case of adolescents, a parent is not always with a child who is buying or renting a video game. Despite many parents' efforts, these games continue to fall into the hands of even young children. For example, a May 4, 2005 press release by Governor Granholm reported that an undercover investigation in six counties found that children as young as nine years old were able to purchase video games rated M or NC-17 at 26 of 58 stores.

Several bills have been introduced in the House of Representatives and the Senate to address the issues of access to violent and sexually explicit video games.

### ***THE CONTENT OF THE BILLS:***

Senate Bill 416 would prohibit knowingly disseminating to a minor an ultra-violent explicit video game, create a civil penalty for a violation, and create an affirmative defense for a person who acted in good faith. Senate Bill 463 would add video games to the obscenity laws.

Both bills would amend Public Act 33 of 1978, which pertains to disseminating, exhibiting, or displaying sexually explicit matter to minors.

"Video game" would be defined in the bills to mean a computer or other device or computer program that stores or receives data or instructions generated by a person who used it, and, by processing that data or instruction, creates an interactive game capable of being played, viewed, or otherwise experienced by an individual. Specifically, the bills contain the following provisions.

#### **Senate Bill 416**

Part I Amendments. The bill would amend Public Act 33 of 1978 (MCL 722.671 et al.) to specify that it would be an affirmative defense to a charge under Part I, entitled Sexually Explicit Matter, that a person acted in good faith. The bill also specifies that the prohibition contained in Part I would not apply to a medium licensed and regulated by the Federal Communications Commission; an Internet service provider or computer network

service provider who, without knowledge of the content of the matter being communicated, provided the medium for the communication; or a person who provided a subscription multichannel video service whose terms of service require purchasers of the service to be at least 17 years of age and to use a credit card to purchase or rent the service or provide a government-issued ID or other reasonable means for verification of the purchaser's or renters identification.

Except as provided below, good faith would exist if, at the time the charged offense occurred, all of the following conditions were satisfied:

- The minor showed the person identification that appeared to be valid and that contained a photograph and date of birth purporting to show that the minor was at least 17 years old, or an Internet provider required a purchaser or renter to be at least 17 and the material was purchased or rented over the Internet, with a credit card, and sent to the purchaser's or renter's home.
- The person did not have independent knowledge that the minor was under 17.
- The person complied with a rating system established by the pertinent entertainment industry that did not conflict with Part I, including the rating system for video games created by the Entertainment Software Rating Board or the rating system for motion pictures created by the Motion Picture Association of America.

For a person with managerial responsibility for a business enterprise, good faith would exist if, at the time the charged offense occurred, the business had a policy that its employees were required to comply with a rating system described above, trained its employees to follow that policy, and enforced the policy.

Part II Amendments. The bill would also add Part II (Ultra-Violent Explicit Matter) to prohibit a person from knowingly disseminating to a minor an ultra-violent explicit video game harmful to minors. Penalties would apply if the person knew both the nature of the video game and the status of the minor to whom the video game was disseminated. Being aware of the game's character and content or recklessly disregarding circumstances suggesting its character and content would constitute knowing the game's nature. A person would know the status of a minor if he or she either was aware that the person to whom the dissemination was made was a minor or recklessly disregarded a substantial risk that the person to whom the dissemination was made was a minor.

A violation would be a state civil infraction with a fine of not more than \$5,000 for a first conviction, a fine of not more than \$15,000 for a second conviction, and a fine of not more than \$40,000 for a third or subsequent conviction. The sanctions for disseminating would not apply to a parent or guardian who disseminated the video game to his or her own child or ward, to a family member of the minor who disseminated the video game to the minor in the minor's own residence, to a guest in a home who disseminated a video game to a minor in the home, or to any person who disseminated the matter for a legitimate medical, scientific, governmental, or judicial purpose.

Falsely representing oneself as the parent or guardian of a minor, or falsely representing that a minor was 17 or older, with the intent to facilitate the dissemination to the minor of ultra-violent explicit video game that is harmful to minors, would be a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$15,000, or both.

A person who had managerial responsibilities for a business renting or selling ultra-violent explicit video games that are harmful to minors could not knowingly permit a minor not accompanied by a parent or guardian to view the matter or performance, or play or view the video game. Except in a restricted area, a manager could not knowingly permit a minor to play or view the video game. A violation would be a misdemeanor punishable by up to 93 days' imprisonment and/or a fine of up to \$25,000.

The bill also adds an affirmative defense identical to that provided for violations of Part I if a person acted in good faith. In addition, the bill would allow a prosecutor to bring an action to enjoin the dissemination of ultra-violent explicit matter that is harmful to matter.

The bill is tie-barred to Senate Bill 463 and House Bills 4702 and 4703. (Senate Bill 463 and House Bill 4702 would add video games to the definitions of "sexually explicit performance" and "sexually explicit visual material" in Public Act 33. House Bill 4703 would require video game retailers to post signs regarding a rating system.)

### **Senate Bill 463**

"Sexually explicit matter" is defined under Public Act 33 of 1978 to mean sexually explicit visual material, sexually explicit verbal material, or sexually explicit performance. Senate Bill 463 would amend the act (MCL 722.673) to add video games to the list of presentations in the definition of "sexually explicit performance" and the list of visual representations in the definition of "sexually explicit visual material" that depict nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse.

The bill is tie-barred to Senate Bill 416.

[Under the act, disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than two years and/or a fine of not more than \$10,000. Facilitative misrepresentation, which involves knowingly making a false representation that a person is the parent or guardian of a minor, or that a minor is 18 years of age or older, with the intent to facilitate the dissemination of sexually explicit matter to that minor, is a misdemeanor punishable by up to 93 days imprisonment and/or a fine of not more than \$5,000.]

### ***HOUSE COMMITTEE ACTION:***

Substitutes for both bills were adopted. The committee substitute for Senate Bill 463 changed the effective date and eliminated the tie-bars to Senate Bill 464 and House Bills 4702 and 4703.

Substantive changes by the committee substitute for Senate Bill 416 incorporated the affirmative defense provisions contained in Senate Bill 464 for violations of Part I of the act, expanded the exemptions under Part I, deleted the legislative findings regarding the impact on children of exposure to ultra-violent explicit matter, changed the focus of Part II to ultra-violent video games only, and changed the criminal penalties to a civil infraction for knowingly disseminating an ultra-violent explicit video game harmful to children.

### ***BACKGROUND INFORMATION:***

The act's definition of "sexually explicit visual material" is as follows: a picture, photograph, drawing, sculpture, motion picture film, or similar visual representation that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a visual representation. An undeveloped photograph, mold, or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

The act defines "sexually explicit performance" as a motion picture, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse. Also, the act defines the term "harmful to minors" using a three-part test: (1) that the matter, considered as a whole, appeals to the prurient interest of minors as determined by contemporary local community standards; (2) that the matter is patently offensive to contemporary local community standards of adults as to what is suitable for minors; and (3) that the matter, considered as a whole, lacks serious literary, artistic, political, educational, and scientific value for minors.

The Entertainment Software Rating Board has created a rating system for video and computer games that is similar to movie ratings. For example, EC (early childhood) could be suitable for ages 3 and older, where T (teen) may be suitable for ages 17 and older; titles rated T could contain mature sexual themes, more intense violence, and/or strong language. A game rated AO (adults only) would be suitable only for adults as it could contain graphic depictions of sex and/or violence. Detailed information on the categories and content descriptors can be found on ESRB's website: [www.ESRB.org](http://www.ESRB.org).

### ***ARGUMENTS:***

#### ***For:***

Senate Bill 463 addresses the problem of retailers selling or renting video games to minors that contain sexually explicit scenes. It does not address games considered to be violent. By specifically listing "video game" in the definition of sexually explicit performance and sexually explicit visual material, knowingly selling, renting, or lending a video game to a person 17 years of age or younger that contained images deemed as sexually explicit matter harmful to minors would subject a retailer (or anyone else) to the penalties outlined in the act – a felony punishable by up to two years imprisonment

and/or a fine of not more than \$10,000. This is a better approach than other bills that would make it a crime to sell or rent games to minors specifically rated Mature or Adult Only; reportedly, that type of approach has raised constitutional questions over the legality of placing a private industry standard in statute.

Passage of the bill won't relieve parents of their responsibility to be aware of the content of the games their children play, but perhaps store owners and their employees will be less likely to sell or rent games containing nudity and sexual themes to children and teens when they realize the penalties that could be incurred.

***For:***

Senate Bill 416 specifically addresses the issue of ultra-violent explicit video games. The bill would define terms, clearly define when a person's actions would trigger penalties, and provide an affirmative defense for retailers and others who acted in good faith. It would encourage retailers to utilize industry rating systems. The bill, along with the other bills in the package, will incorporate a "community" approach to protecting children from potentially harmful video games. The bills will not supplant parents as the primary individuals responsible for educating and protecting their children, but this is one area where it does take "a village to raise a child" as the popular saying goes.

Controversy over the impact on children from the exposure to such video games continues, but many studies have shown violent or aggressive behaviors can follow playing games that graphically depict violence. And, many of these games do disproportionately show violent acts against women and minorities. Even if a small percentage of children were negatively affected for either a short time or a long time after playing violent video games, decreasing access to such games would still have a positive effect on them, their families, and society.

***Against:***

The statute that Senate Bills 416 and 463 would amend is typically used for controlling the sale and access to magazines and adult videos considered pornographic. Case law has established what constitutes sexually explicit material that is harmful to minors. However, where it is easy for a retailer to flip through a magazine to see if there is objectionable material or to scan a movie to do the same, the content of a video game is not as easy to determine. It can take days or months to complete the various levels in a video game and so retailers may not be aware of a game's content. Plus, there are currently over 800 video game titles with a rating of Mature, most of which would not rise to the level of being sexually explicit and perhaps a couple of dozen (primarily computer games) that would be rated AO and not suitable for persons under 18. And, some privately distributed games are not rated at all.

***Against:***

Industry members maintain that the bills are not needed and infringe on constitutional rights. In the last couple of years, many retailers have voluntarily instituted policies aimed at decreasing sales to minors of games rated for adult and mature audiences. The most recent "Video Game Report Card" released by the National Institute on Media and

the Family revealed that minors were unsuccessful 66 percent of the time in their attempts to purchase Mature rated games as compared to just 45 percent the previous year. More time should be given to industry members to continue to develop and institute effective policies rather than taking a legislative approach.

***POSITIONS:***

The Michigan Retailers Association opposes Senate Bill 416. (8-24-05)

The Interactive Entertainment Merchants Association opposes Senate Bill 416. (8-24-05)

A representative of the Entertainment Software Association indicated opposition to Senate Bill 416. (8-24-05)

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