SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Criminal Justice Committee

BILL:	CS/SB 1768
SPONSOR:	Commerce and Consumer Services Committee and Senator Crist
SUBJECT:	Online Dating Services
DATE:	April 21, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	**Fav/CS**
2.	Erickson	Cannon	CJ	**Favorable**
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1768 requires online dating services to disclose to Florida members whether or not the provider conducts criminal background checks on the members. If background checks are performed, the provider must establish a "safety awareness notification" for each Florida member to electronically acknowledge.

The CS provides civil remedies for persons who access an online dating service that is not in compliance, and provides civil penalties against the owners of an online dating service that does not comply with the requirements of the CS.

This CS creates seven undesignated sections of the Florida Statutes.

II. Present Situation:

Online dating services provide an opportunity for persons using the Internet to advertise themselves as available for dating, and to search for others similarly available. There are thousands of online dating services, including large generalized services and smaller specialized services. The two largest services claim to have approximately 13 million subscribers each. Smaller specialized versions often cater to particular ethnic and religious groups, or offer specialized services. Online dating services are currently unregulated by the state.

III. Effect of Proposed Changes:

Section 1 creates s. 501.165, F.S., to provide the title "Florida Internet Dating Disclosure and Safety Awareness Act." Also, this section provides that there is a compelling state interest in increased public awareness of the possible risks to personal safety involved with online dating.

Section 2 creates s. 501.166, F.S., to provide the following definitions:

- "Communicate" or "communicating" means free-form text authored by a member or real-time voice communication through an online dating provider.
- "Criminal background check" means a search for a person's felony and sexual offense convictions by one of the following:
    - By searching all available regularly updated government databases for felony and sexual offense convictions.
    - By searching a database maintained by a private vendor which is updated at least every 30 days and which contains at least the same or substantially similar criminal history records as would be otherwise accessible through searches of all the available government databases (as specified in the CS).
- "Member" means a person who is either a member or who submits to an online dating provider the information required by the provider to access the provider's service for the purpose of engaging in dating, participating in compatibility evaluations with other persons, or obtaining matrimonial matching services.
- "Online dating service provider" or "provider" means a person engaged in the business of offering or providing to its members access to dating, compatibility evaluations between persons, or matrimonial matching services through the Internet.
- "Sexual offense conviction" means a conviction for an offense which would qualify the offender for registration as a sexual offender under s. 943.04355, F.S., or under another state's equivalent statute.

Section 3 creates s. 501.167, F.S., to provide that an online dating service that provides services to residents of Florida must disclose whether or not the service conducts a criminal background check. The disclosures must appear on a web page to be viewed by a person with a Florida address. The disclosure must also appear on a web page each time a Florida member initiates or receives communication with another member of the service, and there must be an electronic acknowledgement that the disclosure has been provided.

If a provider conducts criminal background checks and allows those with criminal histories to still be a member, the provider must display a statement that the member has been identified as having a felony or sexual offense conviction on any communication to a member in Florida.

Section 4 creates s. 501.168, F.S., to provide that any online dating service provider that conducts background checks must provide a link to a "safety awareness notification" web page. Florida members are required to make an electronic acknowledgement of the notification each time the notification appears. The "safety awareness notification" must at a minimum include a list and description of safety measures designed to increase awareness of safer dating practices.

Section 5 creates s. 501.169, F.S., to provide that the Legislature finds that the act of transmitting files over the Internet addressed to residents of the state, and the act of accepting membership fees from residents of the state, means that an online dating service is operating, conducting, engaging in, and otherwise carrying on a business in the state subjecting such online dating service providers to regulation by the state and to the jurisdiction of the state's courts. The failure to comply with the disclosure requirements of this committee substitute constitutes a deceptive and unfair trade practice under part II of ch. 501, F.S., and each failure to provide a required disclosure constitutes a separate violation.

Additionally, the court may impose a civil penalty of up to $1,000 per violation, with an aggregate total not to exceed $25,000 for any 24-hour period for violations of this committee substitute. Suit may be brought by the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's jurisdiction, Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney or by the Division of Consumer Services of the Department of Agriculture and Consumer Services. Any penalties collected shall accrue to the enforcing authority or the division to further consumer enforcement efforts.

Section 6 creates s. 501.171, F.S., to provide that an Internet service provider does not violate this act solely as a result of serving as an intermediary for the transmission of electronic messages between members of an online dating service provider. Also, an Internet access service or other Internet service provider is not an online dating service provider within the meaning of this committee substitute as to any online dating service website provided by another person or entity. Additionally, if a provider has fewer than 1,000 members, it is exempt from the requirements of ss. 501.165-501.171, F.S., created by the CS.

Section 7 provides that the provisions and applications of the act are severable.

Section 8 requests that the Division of Statutory Revision include the provisions in this committee substitute in part I of ch. 501, F.S.

Section 9 provides an effective date of July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This CS may raise potential constitutional issues by requiring disclosures as to whether criminal background checks are performed by online dating service providers. Specifically, the CS may raise potential issues involving the Commerce Clause and the First Amendment. However, this analysis is not intended to indicate or suggest that these issues *will* be raised if the CS becomes law, or, if raised, that a court will find the issues to have merit.

Commerce Clause

Congress has the power to regulate commerce among the states.[1] Congress has stated that "it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[2] Though phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a negative or dormant aspect that denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.

The Dormant Commerce Clause doctrine distinguishes between state regulations that "affirmatively discriminate" against interstate commerce and evenhanded regulations that "burden interstate transactions only incidentally."[3] Regulations that "clearly discriminate against interstate commerce [are] virtually invalid per se,"[4] while those that incidentally burden interstate commerce will be struck down only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[5]

State regulations may burden interstate commerce "when a statute (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods."[6]

"A state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."[7] Because the Internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without "project[ing] its legislation into other States."[8] "We think it likely that the internet will soon be seen as falling within the class of subjects that

[1] Art. I, s. 8, *U.S. Constitution.*
[2] 47 U.S.C. 230(b).
[3] *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
[4] *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 108 (2d Cir.2001).
[5] *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).
[6] *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir.2003) (citations omitted).
[7] *Healy v. The Beer Institute*, 491 U.S. 324, 332 (1989).
[8] *Id*. at 334.

are protected from State regulation because they 'imperatively demand a single uniform rule.'"[9]

In *Johnson*, the court discussed three ways a statute can violate the Commerce Clause. First, a statute may violate the Commerce Clause if it directly regulates conduct outside the state's borders.[10] Second, a statute may violate the Commerce Clause if the burdens on interstate commerce exceed the local benefit of the statute.[11] Finally, statutes that subject individuals to inconsistent regulations where the subject of the regulation has been recognized as requiring national regulation have been held to run afoul of the Commerce Clause.[12]

The *Johnson* court acknowledged the state's compelling interest in protecting minors from harmful, sexually oriented materials.[13] However, the court held that the statute excessively burdened interstate commerce compared to the local benefits that the statute actually conferred. The court also expressed doubt over the state's ability to exercise criminal jurisdiction over out-of-state offenders. Further, the court stated that as between in-state victims and in-state offenders, the benefit conferred by the statute is "extremely small." Finally, the court held that the statute violated the Commerce Clause because it subjected the use of the Internet to inconsistent regulation.[14]

The *Johnson* court relied heavily on the Commerce Clause analysis contained in *American Libraries Ass'n v. Pataki* .[15] In *Pataki*, the court enjoined New York from enforcing a statute which prevented communications with minors over the Internet "which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors."[16] The court found that the statute violated the Commerce Clause for three reasons:

> First, the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states and is therefore per se violative of the Commerce Clause. Second, the benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce. Finally, the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes.[17]

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[9] *American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2nd Cir. 2003). See also, *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999); and *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997)(all three cases striking a state law regulating Internet commerce as a violation of the dormant commerce clause).
[10] *Johnson* at 1160-1161.
[11] *Id*. at 1161-1162. See also,*Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)(the Commerce Clause "bars state regulations that unduly burden interstate commerce.").
[12] *Johnson* at 1162.
[13] *Id*. at 1161-1162.
[14] *Id*. at 1162.
[15] *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997).
[16] *Pataki*, 969 F.Supp. at 163.
[17] *Pataki*, 969 F.Supp. at 183-184.

However, the mere fact that the regulation impacts out-of-state providers does not in itself make the extraterritorial regulation illegal. A state statute must be upheld if it "regulates evenhandedly" a legitimate public interest and the effects of the statute on interstate commerce are only incidental.[18] In *Hamling v. United States,* the court stated that just because community standards vary does not necessarily render a statute unconstitutional.[19]

Further, two Florida district courts have upheld a criminal conviction based on a law banning certain Internet activities, despite Commerce Clause arguments made by the defendants. Both, however, relate to luring or enticing a child for sex through the use of the Internet.[20]

Accordingly, it is unclear how the courts would rule on the background checks or disclosure requirements for online dating services, if challenged as violating the Dormant Commerce Clause.

First Amendment

This CS assumes that all operators of an online dating service would want to encourage their members to conduct a background check before meeting a prospective date. An operator that wanted to take a contrary view, perhaps to say that such a search is not warranted, would have difficulty taking that position because this CS requires disclosures that contradict this view.

The First Amendment right to free speech applies to commercial speech.[21] In later decisions, the Supreme Court gradually articulated a test based on the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.[22] *Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[23]

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[18] *Edgar v. Mite Corporation*, 457 U.S. 624, 640 (1981).
[19] *Hamling v. United States*, 418 U.S. 87, 106 (1974)(holding that the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity).
[20] *Cachett v. State*, 873 So.2d 430 (Fla. 1st DCA 2004); *Simmons v. State*, 886 So.2d 399 (Fla. 1st DCA 2004) (one defendant was a state resident, the other traveled to Florida believing he was meeting a minor for sex).
[21] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
[22] *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980).
[23] *Id.* at 566.

In *Edenfeld v. Fane*, the Supreme Court explained that the Government carries the burden of showing that a challenged regulation directly advances the governmental interest asserted in a direct and material way.[24] That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[25] The court cautions that this requirement is critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."[26]

A state cannot compel a person to distribute a particular statement which that person disagrees. For example, Florida law used to require that a newspaper that published an editorial critical of a candidate for political office was required to provide the politician with space to make a reply. This right of reply law was found unconstitutional in *Miami Herald Publishing Co. v. Tornillo*.[27] In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, the United States Supreme Court ruled that California cannot compel a utility company to give its excess space in billing envelopes to other entities.[28] "Compelled access like that ordered in this case [by the utilities commission] both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[29]

Accordingly, were a First Amendment issue raised regarding the CS, it is unclear how the courts would rule on this issue because it is unclear whether the statements required by the CS rise to the level of compelled speech.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Website operators, who elect to perform criminal background checks, may incur the cost of ordering the background checks. Also, there may be reprogramming costs associated with the accommodation for Florida residents.

C. Government Sector Impact:

The Florida Department of Law Enforcement (FDLE) would receive a $23 increase in revenue for each criminal background check request through FDLE.

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[24] 507 U.S. 761 (1993).
[25] *Id.*, at 770-771.
[26] *Id.*, at 771. *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995)(prohibiting certain government regulation of beer labeling despite a government argument that such restrictions were necessary for health, safety, and welfare).
[27] 418 U.S. 241 (1974).
[28] 475 U.S. 1 (1986).
[29] *Id*. at 9.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Department of Law Enforcement provided comments regarding the original bill. Those comments included, but were not limited to, reporting that private-vendor background checks are, in the FDLE's estimation, unreliable, and if used by online dating service providers, may provide users a false sense of security. The FDLE recommended that the checks be conducted through the FDLC repository. In addition, the FDLE reported that confirming that the person submitting a name for a background check is, in fact, that person is not foolproof.

Staff reiterates that these comments by the FDLE were made to the original bill. The FDLE has not submitted written comments to the CS, and therefore, has not indicated in writing whether the concerns represented regarding the original bill were addressed by the CS.

VIII. Summary of Amendments:

None.