The Florida Senate

PROFESSIONAL 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: Commerce Committee

BILL:	SB 1224
INTRODUCER:	Senators Ring and Lynn
SUBJECT:	Internet Predator Awareness Act
DATE:	March 12, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinely	Cooper	CM	**Favorable**
2.			CJ	
3.			GA	
4.				
5.				
6.				

I. Summary:

This bill creates the "Internet Predator Awareness Act" (act) to provide disclosures on the potential personal safety risks involved with online dating. This bill requires online dating service providers to disclose whether or not they conduct criminal background screenings for each member using the service, or post certain disclosure notices stating that such background checks are not conducted on users of their service. If criminal background screenings are conducted, the online dating service provider must have a policy on whether a person who has been convicted of a felony or sexual conviction may be a member.

This bill provides that the Department of Agriculture and Consumer Services (department) is the clearinghouse for the intake of information relating to this act from consumer, residents, and victims.

This bill provides civil remedies for online dating service providers that are not in compliance with the disclosure requirements. This bill also provides exemptions from the required disclosures for Internet access intermediaries and Internet access service providers.

This bill creates the following sections of the Florida Statutes: 501.165, 501.166, 501.167, 501.168, 501.169, and 501.171. The bill also creates two unspecified sections of Florida law.

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 largest services claim to have millions of 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 and the federal government.

Part II of ch. 501, F.S, is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). This act provides remedies and penalties for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."[1] Remedies for acts prohibited by FDUTPA may include an action to enjoin a person from committing such acts,[2] as well as, the imposition of a civil penalty of not more than $10,000.[3] Actions may be brought by a state attorney or the Department of Legal Affairs[4] or by a consumer.[5]

Additionally, EDUPTA permits any person who has been aggrieved by a violation under FDUPTA to obtain a declaratory judgment and to enjoin a person who has or is violating FDUPTA.[6] A person who has suffered a loss as a result of such violation may be able to recover actual damages, attorney's fees, and costs.[7]

III. Effect of Proposed Changes:

Section 1 creates s. 501.165, F.S., to provide that the act will be titled the "Internet Predator Awareness Act" and to state that the Legislature received public testimony that criminal and sex offenders use online dating services to prey upon Florida citizens.

This section provides legislative findings that Florida residents need to be informed when viewing online dating websites of the potential risks to personal safety associated with online dating. This section also provides that requiring disclosures in the form of guidelines for safer dating and informing Florida residents as to whether a criminal background screening has been conducted on members of the online dating service fulfill a compelling state interest to increase the public awareness of risk associated with Internet dating activities.

This section further provides that the Legislature finds that the act of transmitting dating information over the Internet addressed to Florida residents, and the act of accepting membership fees from Florida residents shows that an online dating service is operating, conducting, engaging in, and otherwise carrying on business in Florida, subjecting itself to the jurisdiction of the Florida courts.

Section 2 creates s. 501.166, F.S., to provide definitions, including definitions for:

[1] Section 501.201, F.S.
[2] Section 501.207(1)(b), F.S.
[3] Section 501.2075, F.S. Violations against a senior citizen or handicapped person may result in a penalty of not more than $15,000 (s. 501.2077, F.S.).
[4] Section 501.207, F.S.
[5] *Id.*
[6] Section 501.211(1), F.S.
[7] Section 501.211(2), F.S.

- "Criminal background screening," which means a search for a person's felony and sexual offense convictions initiated by an online dating service provider and conducted by one of the following:
    - By searching available and regularly updated government public record databases for felony and sexual offense convictions so long as such databases, in the aggregate, provide substantial national coverage; or
    - By searching a database maintained by a private vendor that is regularly updated and is maintained in the United States with substantial national coverage of criminal history records and sexual offender registries.
- "Sexual offense conviction," which means a conviction for an offense that would qualify the offender for registration as a sexual offender pursuant to s. 943.0435, F.S., or under another jurisdiction's equivalent statute.

Section 3 creates s. 501.167, F.S., to require an online dating service provider offering service in Florida, to provide a safety notification with, at minimum, a list and description of safety measures designed to increase awareness of safer dating practices as determined by the provider. Examples of such notification are provided.

This section also requires an online dating service provider who does not conduct criminal background screenings to disclose to all Florida members that it does not do so. This disclosure must be provided when an electronic mail message is sent or received by a Florida member, on the member's profile, and on the provider's website pages used when a Florida member signs up for the service.

If an online dating service provider conducts criminal background screenings, the provider must disclose to all Florida members that the online dating service does so prior to a Florida member communicating with another member. The disclosure must be provided on the provider's website pages used when a Florida member signs up for the service. In addition, the provider must disclose that background screenings are not foolproof, that not all criminal records are publicly available, and that members participate in that service at their own risk. The provider must also disclose whether it has a policy allowing a member who has been identified as having a felony or sexual offense conviction to have access to its service to communicate with Florida members.

Section 4 creates s. 501.168, F.S., to provide that the Department of Agriculture and Consumer Services will serve as a clearinghouse for the intake of information concerning this act, and that the consumer hotline may be used for this purpose. This section provides that information obtained must be directed to the appropriate enforcement entity.

Section 5 creates s. 501.169, F.S., to require that an online dating service provider that registers Florida members must comply with this act. The failure to comply constitutes a deceptive and unfair trade practice under part II of ch. 501, F.S., and each failure to comply constitutes a separate violation.

This section also provides that a court may impose a civil penalty of up to $1,000 per violation, with an aggregate total not to exceed $25,000 for a 24-hour period. Penalties collected must be used to further consumer enforcement efforts by the enforcing entity or the Division of Consumer Services of the Department of Agriculture and Consumer Services.

Section 6 creates s. 501.171, F.S., to provide that an Internet access service or other Internet service providers do not violate this act by serving only as an intermediary for the transmission of electronic messages between online dating service provider members. An Internet access service or other Internet service provider is not an online dating service provider as defined in this act as to any online dating service website provided by another person or entity.

Section 7 directs the Division of Statutory Revision to include ss. 501.165-501.171, F.S., created above, in part I of ch. 501, F.S.

Section 8 provides a severability clause.

Section 9 provides an effective date of July 1, 2007.

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 bill may raise potential constitutional issues by requiring disclosures as to whether criminal background checks are performed by online dating service providers. Specifically, the bill may raise issues involving the Commerce Clause and the First Amendment.

Commerce Clause

Congress has the power to regulate commerce among the states.[8] 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."[9] 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.

[8] Art. I, s. 8, *U.S. Constitution.*
[9] 47 U.S.C. 230(b).

The Dormant Commerce Clause doctrine distinguishes between state regulations that "affirmatively discriminate" against interstate commerce and evenhanded regulations that "burden interstate transactions only incidentally."[10] Regulations that "clearly discriminate against interstate commerce [are] virtually invalid per se,"[11] 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."[12]

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."[13]

"A state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."[14] 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."[15] "We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand a single uniform rule.'"[16]

In *ACLU v. 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.[17] Second, a statute may violate the Commerce Clause if the burdens on interstate commerce exceed the local benefit of the statute.[18] 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.[19]

The *Johnson* court acknowledged the state's compelling interest in protecting minors from harmful, sexually oriented materials.[20] However, the court found that the statute excessively burdened interstate commerce compared to the local benefits that the statute

[10] *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
[11] *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 108 (2d Cir.2001).
[12] *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).
[13] *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir.2003) (citations omitted).
[14] *Healy v. The Beer Institute*, 491 U.S. 324, 332 (1989).
[15] *Id*. at 334.
[16] *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).
[17] *Johnson* at 1160-1161.
[18] *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.").
[19] *Johnson* at 1162.
[20] *Id*. at 1161-1162.

actually conferred.[21] The court also held that the statute violated the Commerce Clause because it subjected the use of the Internet to inconsistent regulation.[22]

The *Johnson* court relied heavily on the Commerce Clause analysis contained in *American Libraries Ass'n v. Pataki* .[23] 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."[24] 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.[25]

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.[26] In *Hamling v. United States*, the court stated that just because community standards vary does not necessarily render a statute unconstitutional.[27]

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.[28]

Accordingly, it is not clear whether the courts will uphold the background checks or disclosure requirements for online dating services, if challenged as violating the Dormant Commerce Clause.

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[21] *Id.* at 1161.
[22] *Id*. at 1162.
[23] *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).
[24] *Pataki*, 969 F.Supp. at 163.
[25] *Pataki*, 969 F.Supp. at 183-184.
[26] *Edgar v. Mite Corporation*, 457 U.S. 624, 640 (1981).
[27] *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). *American Trucking Associations, Inc. v. Michigan Public Commission*, 73 U.S. 4532 (2005) (The Court held that a $100 annual fee on trucks that engage in intrastate commercial hauling does not violate the dormant Commerce Clause because it is assessed evenhandly and is focused on local activity.)
[28] *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).

First Amendment

The First Amendment right to free speech applies to commercial speech.[29] The Supreme Court has 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.[30] *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.[31]

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.[32] 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."[33] 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."[34]

A state cannot compel a person to distribute a particular statement with 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*.[35] 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.[36] "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."[37]

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[29] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
[30] *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980).
[31] *Id.* at 566.
[32] 507 U.S. 761 (1993).
[33] *Id.* at 770-771.
[34] *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).
[35] 418 U.S. 241 (1974).
[36] 475 U.S. 1 (1986).
[37] *Id*. at 9.

As it relates to the First Amendment, it is not clear whether the notification or disclosures required by this bill rise to the level of compelled speech.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Online dating service providers who elect to perform criminal background screenings will incur the associated costs of the background screenings.

For all Internet dating services, there may be reprogramming costs associated with the required notices for Florida residents.

C. Government Sector Impact:

Section 4 of this bill creates s. 501.168, F.S., to provide that the Department of Agriculture and consumer Services will serve as a clearinghouse for the intake of information concerning this act, and that the department's consumer hotline may be used for this purpose. The department indicates that the impact of this provision will be negligible.

In addition, section 5 provides that any penalties imposed by the court for violations of the act "must be used to further consumer enforcement efforts by the enforcing entity." Collections could offset any additional costs to the department.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Illinois Legislature is currently considering a bill that would require online dating service providers to either conduct criminal background checks or to inform their members that they do not conduct criminal background checks.[38]

[38] Illinois General Assembly, Bill Status of HB 0563, *available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=563&GAID=9&DocTypeID=HB&LegId=27622&SessionID=51&GA=95 (lasted visited March 6, 2007).

VIII. Summary of Amendments:

None.