

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB's 1284, 1476, 1528 and 1616

SPONSOR: Senators Geller, Saunders and Latvala

SUBJECT: Improper Activity Over the Internet

DATE: April 4, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	<u>FP</u>	_____
5.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for Senate Bills 1284, 1476, 1528 and 1616 is intended to enact into law several of the recommendations of the Information Service Technology Development Task Force regarding improper activity over the Internet. The legislation is consistent with these task force recommendations:

- Ensure that the statutory protections provided for businesses and the public against fraud, child abuse, and other criminal activity continue to be viable in the new world of electronic commerce over the Internet.
- Ensure that governmental entities are also afforded protection against on-line criminal activity.
- Increase public awareness of potential dangers of Internet use and inform the public about precautionary measures that may be taken to avoid being victimized by on-line criminal activity.
- Prohibit the transmission over the Internet of pornography to any minor in this state and the transmission over the Internet of child pornography to any person in this state.
- Provide immunity from civil liability to a person who reports to law enforcement what the person reasonably believes to be child pornography.

This CS substantially amends or creates the following sections of the Florida Statutes: 501.203; 501.207; 501.2075; 501.2091; 501.211; 501.212; 847.001; 847.0137; 847.0139.

II. Present Situation:**A. Creation and Responsibilities of the Information Service Technology Task Force**

On June 11, 1999, the Legislature created the Information Service Technology Task Force (referred to in this analysis as the "task force"), comprised of 34 bipartisan members from the public and private sector. *See* Chapter 99-354, L.O.F. The task force exists for two years. Since its creation, the task force has held several meetings at various sites around the state. The task force was established for the purpose of developing policies to benefit residents of this state by fostering the free market development and beneficial use of advanced communication networks and information technologies within this state. In order to implement the legislative mandate, the task force established eight subcommittees. Based on its stated objective, each subcommittee developed policy recommendations that will affect Florida's position in the technology marketplace. The recommendations of one subcommittee are relevant to this analysis: Subcommittee 7 (the "eLaws: Civil and Criminal" Subcommittee, referred to in this analysis as the "subcommittee").

B. Responsibilities of the Subcommittee

On February 14, 2000, the Task Force issued a report containing numerous policy recommendations, and implementation strategies to carry out those recommendations, from the eight subcommittees. The intent of the policy recommendations submitted was to protect and serve the citizens of Florida. *See 1999 Annual Report to the Legislature*, Information Service Technology Task Force (February 14, 2000) (all information included in this section is from this report).

Subcommittee 7 was charged with the responsibility of evaluating state laws, rules, and procedures to determine if there was a need to create new laws or amend or repeal existing laws, rules, or procedures to reflect the impact of "ecommerce." "Ecommerce," otherwise referred to as "electronic commerce," is the buying or selling of products and services by businesses and consumers over the Internet. Three typical ecommerce transactions take place over the Internet: business to business; business to consumer; and consumer to consumer.

C. General Findings of the Subcommittee

The subcommittee noted that most of Florida's laws were created prior to the rapid proliferation of the Internet and ecommerce, and stressed that it was important to ensure that the many protections against fraud, child abuse, and other victimization continue into the new world of ecommerce. The subcommittee also recognized the importance of the Florida courts maintaining jurisdiction over perpetrators of crimes in order to protect Florida businesses and residents. In addition to the need for changes to criminal laws, the subcommittee stressed that Florida must look to amend its civil laws to protect its citizens and businesses and foster growth in high-tech-salaried jobs.

As a general policy statement, the subcommittee recommended:

Sellers of goods and services to businesses and individuals in Florida should be regulated in the same manner, regardless of the method used to contact or deliver the goods or services to that business or individual. The person's right to equal protection under the laws of this state should not be diminished because of the type of sales transaction having changed due to technological advances.

D. Subcommittee Recommendations Relating to FDUTPA

The subcommittee made several recommendations to amend the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The following changes were recommended:

- Clarify that exemptions to FDUTPA do not include telecommunications companies regulated by the Public Service Commission (PSC).
- Repeal s. 501.2091, F.S., concerning venue, to avoid misuse of this venue section by Internet businesses located out-of state.
- Clarify that the definition of "consumer" in s. 501.203(7), F.S., and s. 501.211(2), F.S., covers businesses. Chapter 501, F.S., relates to consumer protection, and Part II of this chapter addresses deceptive or unfair trade practices.
- Ensure that governmental entities are afforded the same protection from those who deceive or defraud them as is currently provided to Florida businesses and individual consumers by FDUTPA.

1. Clarify FDUTPA Application for PSC-Regulated Telecommunications Companies

The subcommittee explained that businesses and individuals are afforded broad protection from unfair or deceptive acts under FDUTPA. The statutory definitions in FDUTPA include coverage of any non-exempt activity in any "trade or commerce," including Internet activities. The broad proscription provided by FDUTPA applies through civil enforcement across industries and business conduct generally in any medium, including the Internet.

As background for the clarification of the FDUTPA exemption for PSC-regulated telecommunication companies, the subcommittee explained that, for FDUTPA to apply, an individual or entity must not be exempt from the FDUTPA's application pursuant to s. 501.212(4), F.S. An exemption which may impact coverage of FDUTPA to a growing number of Internet operators and merchants is contained in s. 501.212(4), F.S., and relates to those persons regulated by the PSC.

The PSC exemption was part of the original 1973 version of FDUTPA which antedates the era of telecommunications deregulation and the Internet. Today, companies of all sizes and backgrounds are becoming PSC-certificated and operating diversified businesses involving

the Internet and other telecommunications endeavors. Scores of telecommunications companies are entering the Internet market as Internet service providers or simply to market their goods and services in another medium.

PSC staff informed the Office of the Attorney General that the PSC takes the position it does not regulate Internet activities, including activities engaged in by persons holding PSC certificates. No Florida state appellate court has addressed the PSC exemption, though one Florida federal court has noted that the exemption as currently written, applied not only to any "activities" regulated by the PSC but also to any person so regulated. *City of Gainesville v. Florida Power and Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980). The court framed the issue as being whether Florida Power and Light Co. was a "person" under the exemption, and if so whether all of its actions were therefore exempt. The court did not resolve this issue, determining the issue to be a question of state, rather than federal law.

The subcommittee presumed, in line with the issue framed in *City of Gainesville*, that the term "person" under s. 501.212(4), F.S., could apply to anyone certificated by the PSC no matter what legitimate or illegitimate Internet activity the person may conduct. The subcommittee believed that, as a "person" certificated by the PSC, a company doing business over the Internet may well assert an exemption from the current version of FDUTPA as a PSC-regulated "person." The subcommittee also believed that, where the PSC does not regulate Internet activities of PSC-certificated persons, any such "person" could also escape any consumer protection-related scrutiny and enforcement by the PSC.

As an implementation strategy to resolve what the subcommittee identified as a "possible loophole" created by the PSC-regulated companies exemption, the subcommittee recommended that legislation should be enacted to amend s. 501.212(4), F.S., to remove the word "person," so that this subsection would only apply to any "activity" regulated under laws administered by the Department of Insurance, the PSC, or banks and savings and loan associations regulated by the Department of Banking and Finance or federal agencies.

2. Repeal Venue Section in FDUTPA

As background for the issue relating to venue under FDUTPA, the subcommittee stated that the venue section in FDUTPA, s. 501.2091, F.S., is outdated, existing in tandem with an administrative (Chapter 120, F.S.) enforcement scheme that has been repealed. The subcommittee further stated that the administrative venue section was erroneously left in FDUTPA, and has posed difficulties, at least in one instance, for the State Attorney's enforcement of the statute in circuit court, citing *Maddox v. State*, 709 So.2d 611 (Fla. 1st DCA 1998). The subcommittee's concern with the statutory language was that it may be misused by an out-of-state Internet provider to assert that venue in any case, administrative or otherwise, is only proper in the provider's home state.

As an implementation strategy to address this venue issue, the subcommittee recommended the repeal of s. 501.2091, F.S.

3. Clarify the Definition of Consumer in FDUTPA Includes Businesses

As background for the clarification of the definition of “consumer” to ensure that businesses are covered, the subcommittee explained that one of the task force’s mandates was to promote a free and fair marketplace in Florida for all types of businesses, including businesses that may be involved in ecommerce. Since 1979, FDUTPA has contained a definition of “consumer” in s. 501.203, F.S., which includes corporations and other businesses, and the Attorney General routinely investigates parties who have victimized legitimate businesses. The subcommittee found that in spite of changes to the law in 1993 (the inclusion of a statement of intent) to address confusion in the courts over whether the term “consumer” includes businesses for the purposes of protecting those businesses from deceptive trade practices and unfair methods of competition under FDUTPA, the courts have been inconsistent in their interpretations of s. 501.203, F.S., and its protection of businesses.

As an implementation strategy to end this confusion regarding the inclusion of businesses in the definition of “consumer” and the protection of those businesses under FDUTPA, the subcommittee recommended that legislation be enacted to amend the definition of “consumer” in s. 501.203, F.S. (definitions), to insert the word “business” and the words “any commercial entity, however denominated.” To clarify that all types of business entities may seek relief under FDUTPA, the subcommittee recommended amending s. 501.211, F.S. (individual remedies), to replace the term “consumer” with the term “person” so that a “person” who has suffered a loss as a result of a violation of FDUTPA, may seek recovery of actual damages, including attorney’s fees and specified costs.

4. Ensure FDUTPA Coverage of Governmental Entities

As background for the issue of protecting governmental entities under FDUTPA, the subcommittee explained that governmental entities at all levels are becoming more and more connected to the Internet but do not currently receive the same protections under FDUTPA as that act affords to private parties. For example, the Attorney General is currently seeking protection for governmental units in antitrust-related matters.

As an implementation strategy to ensure protection for governmental entities under FDUTPA, the subcommittee recommended that legislation be enacted to clarify and codify the current practice of the Attorney General to protect state and local governments from deception and unfairness in their business dealings for goods or services, and further to clarify that those governmental entities may protect themselves from unscrupulous businesses that may victimize them.

The subcommittee specifically recommended the addition of the words “governmental entities” to s. 501.207, F.S. (remedies of the enforcing authority), and s. 501.2075, F.S. (civil penalties). The effect of these amendments is that the “enforcing authority” may bring an action on behalf of a governmental entity for the actual damages caused the entity by deceptive or unfair trade practices. Upon motion of the enforcing authority or any interested party in any action brought for damages as a result of a violation of FDUTPA, the court makes appropriate orders including the reimbursement of governmental entities found to have been damaged or to carry out a transaction in accordance with governmental entities’

reasonable expectations. The “enforcing authority” may terminate an investigation or action upon acceptance of a person’s voluntary compliance with FDUTPA. Acceptance of an assurance may be conditioned on a commitment of the person to reimburse the governmental entity (or for other prescribed reasons). The enforcing authority or the court may waive a civil penalty incurred as a result of the violation of FDUTPA if the person has previously made full restitution or reimbursement or has paid actual damages to the governmental entity who has been injured.

E. Subcommittee Recommendations Relating to Internet Transmission of Pornography

The subcommittee examined the issue of transmission of adult and child pornography over the Internet as a subset of the criminal activity facilitated through use of the Internet. At the outset, the subcommittee found this to be a difficult issue to resolve, finding that many considerations were involved, including First Amendment issues regarding adult pornography and jurisdictional issues regarding child pornography.

As an implementation strategy to address the transmission of pornography over the Internet, the subcommittee agreed with, and recommended legislation to reflect, the following statements:

- If anyone in or outside of the State of Florida knowingly (or should have known) transmits any type of pornography to a minor in Florida, a crime has occurred and Florida has jurisdiction.
- If anyone in this state transmits child pornography to anyone in or outside the State of Florida, a crime has occurred and Florida has jurisdiction.
- If anyone outside of the State of Florida knowingly (or should have known) transmits child pornography to anyone in the State of Florida, a crime has occurred and Florida has jurisdiction.

The Task Force provides no specific recommendation on the definition of “pornography” or “child pornography” for the purpose of these new offenses.

F. Subcommittee Recommendation Relating to Civil Immunity for Third Parties Reporting Child Pornography

Connected to the child pornography issue, the subcommittee also discussed and addressed the issue of third parties reporting child pornography. The subcommittee noted that questions have arisen as to what obligation, if any, a third party should have to report child pornography the party has located during the course of business. Examples involving third parties provided by the subcommittee included computer repair shops that locate child pornography during the repair of a customer’s computer or a commercial developer who comes across digital or regular photographs that may be child pornography.

The subcommittee agreed that any incidence of locating child pornography should be reported to law enforcement and those third parties who do report child pornography should be immune from

civil liability. However, the subcommittee could not agree on requiring third parties to report child pornography.

As an implementation strategy to address voluntary reporting of child pornography by third parties, the subcommittee recommended enacting legislation that would not require anyone to report pornography, including child pornography, but would grant immunity from civil liability to a third party who reports to law enforcement what the party reasonably believes to be child pornography. This immunity would extend to a third party who furnishes a copy of a photograph or other evidence to law enforcement which the third party reasonably believes to be child pornography.

G. Subcommittee Recommendation Relating to a Public Awareness Campaign on Internet Safety and Security

The subcommittee also addressed what the members identified as a need for greater public awareness of issues regarding Internet safety and security. While recognizing that the Internet offers enormous positive opportunities for Florida's citizens, the subcommittee cautioned that the Internet also offers many opportunities for criminal activity and victimization. The subcommittee noted that computer crime today is a multi-billion dollar problem.

While the subcommittee believed that many citizens have become aware of the potential dangers of the Internet and are cautious in their use of it, the subcommittee also believed that others, maybe even most Internet users, are unaware of the potential dangers of Internet use, unaware of what they can do to prevent becoming victims of on-line crimes, or both. The subcommittee noted that often it is only after an incident occurs that the user realizes his or her vulnerability, and that realization may come too late to prevent the user from being victimized.

As an implementation strategy to effect greater public awareness of the potential dangers of Internet use and measures that can be taken to prevent becoming the victim of on-line crime, the subcommittee recommended developing a practical and useful public awareness campaign to educate Internet users in Florida on the issue of safety and security. The subcommittee identified the goal of this effort is to help children and adults recognize the potential dangers of Internet use and to offer guidelines on how to avoid becoming an on-line victim. The subcommittee believed that if Internet users were more informed about the potential dangers of Internet use, and knowledgeable of the precautions to take against on-line crime, they would feel more secure in their use of the Internet and the proliferation of Internet and ecommerce would be enhanced.

The subcommittee recommended that the Florida Department of Law Enforcement (FDLE) Computer Crime Center be tasked with coordinating the development of a comprehensive online-safety-public awareness campaign involving a partnership of the FDLE, the Office of the Attorney General, the Department of Education, and other necessary agencies.

The subcommittee believed that, at a minimum, the public campaign should include the development of guidelines for the safe and secure use of the Internet, including the best means to prevent users from becoming the victims of on-line crime. There should be detailed guidelines for parents to consider for the protection of their children from on-line encounters with molesters, pedophiles and other criminal elements.

The subcommittee recommended as a further component of this public campaign the development of an on-line crime reporting mechanism, also using the FDLE's public web site. The FDLE would be responsible for working closely with local law enforcement agencies in the investigation and prosecution of reported on-line crimes.

III. Effect of Proposed Changes:

The Committee Substitute for Senate Bills 1284, 1476, 1528 and 1616 is intended to enact into law recommendations of the Information Service Technology Development Task Force regarding improper activity over the Internet. This intent is particularly indicated by the preamble to the CS which describes the applicable task force recommendations addressed in the legislation and their relation to improper activity over the Internet.

The applicable recommendations essentially fall into three categories: proposed changes to the law to clarify or afford protection under FDUTPA for businesses, companies and governmental entities who may use the Internet or engage in ecommerce, and who potentially may be victimized by those who engage in on-line criminal activity; proposed changes to the law that enhance public awareness of the potential dangers of Internet use and inform the public of precautionary measures that may be taken to ameliorate those dangers; and proposed changes to the law that address Internet transmission of pornography to minors in this state and child pornography to anyone in this state and encourage reporting of child pornography by providing immunity from civil liability for those persons who report to law enforcement what they reasonably believe to be child pornography.

Described as follows are the features of the CS.

A. Create a Public Awareness Campaign on Internet Safety and Security

Consistent with the subcommittee's recommendation relating to the development of a public awareness campaign on Internet safety and security, the CS requires that the Computer Crime Center within the Florida Department of Law Enforcement coordinate the development of a comprehensive public awareness campaign on Internet safety. This partnership should include a partnership of the FDLE, the Attorney General, the Department of Education, and other necessary agencies and organizations.

The CS mandates, at a minimum, that the campaign include the development of guidelines for the safe and secure use of the Internet, including the best means to prevent users from becoming the victims of on-line crime. There should be detailed guidelines for parents to consider for the protection of their children from on-line encounters with molesters, pedophiles and other criminal elements.

The CS also requires that the campaign include the development of a mechanism to report Internet crimes through FDLE's public Internet site, and requires FDLE to work in cooperation with local law enforcement agencies in investigating and prosecuting Internet crimes.

B. Clarify the Definition of Consumer in FDUTPA Includes Businesses

Consistent with the recommendation of the subcommittee to clarify that the definition of “consumer” in FDUTPA covers businesses, the CS amends the definition of “consumer” in s. 501.203(7), F.S. (definitions), to add the word “business” and the words “any commercial entity, however denominated.”

Consistent with the recommendation of the subcommittee to clarify that all types of businesses may seek their own relief under FDUTPA, the CS amends s. 501.211(2), F.S. (individual remedies), to delete the word “consumer” and insert the word “person.”

C. Ensure that Governmental Entities are Protected by FDUTPA

Consistent with the recommendation of the subcommittee to ensure that governmental entities are protected by FDUTPA, the CS amends s. 501.207, F.S. (remedies of the enforcing authority) and s. 501.2075, F.S. (civil penalties), to add the words “governmental entities” so that the “enforcing authority” may bring an action on behalf of a governmental entity for the actual damages caused the entity by a violation of FDUTPA. Upon motion of the enforcing authority or any interested party in any action brought for damages as a result of a violation of FDUTPA, the court makes appropriate orders, including the reimbursement of governmental entities found to have been damaged, or requiring that a transaction be carried out in accordance with the governmental entity’s reasonable expectations. The “enforcing authority” may terminate an investigation or action upon acceptance of a person’s voluntary compliance with FDUTPA. Acceptance of an assurance may be conditioned on a commitment of the person to reimburse the governmental entity (or for other prescribed reasons). The enforcing authority or the court may waive a civil penalty incurred as a result of the violation of FDUTPA if the person has previously made full restitution or reimbursement or has paid actual damages to the governmental entity who has been injured.

D. Repeal Venue Section in FDUTPA

Consistent with the subcommittee’s recommendation to repeal s. 501.211, F.S., the CS repeals this section. The purpose of the repeal is to prevent an out-of-state Internet provider from asserting venue in any case, administrative or otherwise, that is only proper in the provider’s home state.

E. Clarify FDUTPA Application for PSC-Regulated Telecommunications Companies

Consistent with the subcommittee’s recommendation to close a “possible loophole” that may allow a PSC-certificated company doing business over the Internet to assert an exemption from FDUTPA as a PSC-regulated “person” under s. 501.212(4), F.S., the CS amends this subsection to delete the word “person” so that the subsection will only apply to any “activity” regulated under laws administered by the Department of Insurance, the PSC, or banks and savings and loan associations regulated by the Department of Banking and Finance or federal agencies.

F. Prohibit Certain Internet Transmissions of Pornography and Provide Immunity from Civil Liability to Third Parties Who Report Child Pornography to Law Enforcement

Consistent with the subcommittee's statements that certain transmissions of pornography constitute crimes over which Florida has jurisdiction, and the subcommittee's recommendation that legislation be enacted consistent with those statements, the CS creates s. 847.0137. This new section prohibits such transmissions and provides that Florida has jurisdiction over violations involving this criminal conduct, whether or not the violator lives in Florida.

To prohibit the transmission of child pornography to any person in Florida, the CS initially defines "child pornography," since no definition of this term exists in Florida law. The CS amends s. 847.001, F.S. (definitions), to create a definition of "child pornography." The CS defines "child pornography" as "any image depicting, or intending to depict, a minor engaged in sexual conduct."

"Sexual conduct" is currently defined in s. 847.001, F.S., as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed." The definition excludes a mother breastfeeding her baby.

Part of the current definition of "sexual conduct" in s. 847.001, F.S., the phrase "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast," appeared in a former definition of "sexual conduct" in s. 827.071(1)(g), F.S. (sexual performance by a child). That language was struck down by the Florida Supreme Court, which severed the objectionable language and retained the remainder of the definition, because, in the court's estimation, the language was overbroad and violated due process. The court held that the language impermissibly chilled free speech and expression by punishing "entirely innocent and innocuous activities involving families and children, which clearly are protected by the guarantee of free expression." *Schmitt v. State*, 590 So.2d 404, 413 (Fla. 1991). Further, the court held that the particular language violated due process because, to the extent the language punished innocent and innocuous activities, it lacked a rational relationship to its obvious purpose.

Subsequent to *Schmitt*, the definition of "sexual conduct" in s. 827.071(1)(g), F.S., was amended to read: "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, *with the intent to arouse or gratify the sexual desire of either party.*" This modified definition has not been challenged.

The CS amends the definition of "sexual conduct" to include this modified definition. Because the new definition of "child pornography" is tied with the modified definition of sexual conduct, a reading of the definition of "child pornography" will not require a reading of the *Schmitt* decision in tandem with the definition of "sexual conduct."

Having defined "child pornography," the CS then creates a new offense which incorporates the subcommittees's recommendation. The CS provides that, notwithstanding ss. 847.012 and 847.0133, F.S., any person in this state commits a third degree felony if that person:

- Transmits, by means of the Internet, child pornography to another person in this state or in another jurisdiction; or
- Under the circumstances, knew or should have known that he or she was transmitting, by means of the Internet, an image harmful to minors, as described in s. 847.001, F.S., to a minor, or a person believed to be a minor, in this state.

The CS also provides that, notwithstanding ss. 847.012 and 847.0133, F.S., any person in any other jurisdiction commits a third degree felony if that person:

- Under the circumstances, knew or should have known that he or she was transmitting, by means of the Internet, child pornography to any person in this state; or
- Under the circumstances, knew or should have known that he or she was transmitting, by means of the Internet, an image harmful to minors, as described in s. 847.001, F.S., to a minor, or a person believed to be a minor, in this state.

"Harmful to minors" is currently defined in s. 847.001(3), F.S., as that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, or sexual excitement when it:

- Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

"Nudity," "sexual conduct," and "sexual excitement" are also defined in s. 847.001, F.S.

The language relevant to transmission of an image harmful to minors to a person believed to be a minor in this state accommodates legal law enforcement operations in which a law enforcement officer poses as a minor for the purpose of apprehending persons who use the Internet to prey on children. "Minor" is defined in the CS as a person under 18 years of age.

The words "notwithstanding ss. 847.012 and 847.0133" are intended to indicate that, to the extent the conduct prohibited by this new section also may be covered by one or both of the cited sections, the conduct may be prosecuted as a violation of this new section. Section 847.012, F.S., relates to sale or other distribution of harmful materials to a person under 18 years of age, and includes "visual representations." Section 847.0133, F.S., in part, prohibits the "transmission" of "obscene material" to a minor.

The CS provides that the new section shall not be construed to prohibit prosecution of a person in this state or any other jurisdiction for a violation of any law of this state, including a law providing for greater penalties than prescribed in this new section for the transmission, by means of the Internet, of an image harmful to minors or depicting child pornography, as defined in s. 847.001, F.S. Therefore, this provision allows for prosecution of the conduct under another section that provides for greater penalties (see "Related Issues" section).

The CS also provides that a person is subject to prosecution in this state, pursuant to Chapter 910, F.S., which relates to state criminal jurisdiction, for any act proscribed by this section, including acts in violation of this new section committed by a person in another jurisdiction. This provision is patterned after a similar provision in s. 847.0135, F.S. (computer pornography).

Consistent with the subcommittee's recommendation that third parties be immune from civil liability for reporting to law enforcement what they reasonably believe to be child pornography, the CS creates s. 847.0139, F.S. This new section grants immunity from civil liability to any person who reports to law enforcement what the person reasonably believes to be child pornography. This immunity would extend to any person who furnishes a copy of a photograph or other evidence to law enforcement which the person reasonably believes to be child pornography.

The effective date of the CS is July 1, 2000.

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:

In relation to the current offenses relating to transmission of materials "harmful to minors," there are some distinctions that can be made between these offenses and the offenses reviewed in *Reno v. American Civil Liberty Union*, 521 U.S. 844 (1997), and more recently, *Cyberspace, Communications, Inc. v. Engler*, 55 F.Supp.2d 737 (E.D. Mich).

Unlike the first federal Communications Decency Act reviewed in *Reno*, the offense does not rely on either inherently vague terminology or terminology that incorporates one prong of the *Miller* standard (the 3-pronged standard for obscenity in *Miller v. California*, 413 U.S. 15 (1973)) that was struck down in *Reno*. The offense requires, in part, the transmission of images "harmful to minors." That phrase is specifically defined in s. 847.001, F.S., as the

quality of any description, exhibition, presentation, or representation in whatever form when it satisfies three requirements which are, if not a word-for-word-rendition of the *Miller* standard, embody that three-prong standard.

The offense created by the instant legislation is also distinguishable from the Michigan act reviewed in *Cyberspace, Communications, Inc.* which redefined obscenity as sexually explicit matter.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An analysis of the fiscal impact of the new offense created by this CS was not available at the time this analysis was completed. However, the fiscal impact is anticipated by staff to be indeterminate.

The Florida Department of Law Enforcement (FDLE) states that the CS will require the department to develop a mechanism for the public to report Internet crimes through the FDLE Internet web site. This will require the development of a web-based "form" for input of the information and a database for storage and management of the reports. FDLE estimates the CS will require \$80,000 for the department to implement the bill: \$45,000 for a contract web developer for four months; and \$35,000 for a contract database analyst for three months. Maintenance of the system will be subsumed under routine operations. FDLE has informed staff that this fiscal analysis by the department is not intended to reflect all costs FDLE might incur as a result of this legislation but only the costs of the web-based form and database.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Committee Substitute for Senate Bill 1618 creates a new offense that prohibits live transmission of certain sexual acts over a computer on-line service, Internet service, or local bulletin board service. There may be some cross-over between the new offense created by this CS and the offense created by CS/SB 1618. However, this CS provides that the new section shall not prohibit prosecution of the conduct under a section providing for a greater penalty. The offense created by

this new section is a third degree felony; the offense created by CS/SB 1618 is a second degree felony. Therefore, there is no conflict.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
