HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1459 Advanced Technology
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee		Wright	Hamon

SUMMARY ANALYSIS

Artificial intelligence (AI) encompasses a large field of existing and emerging technologies, methodologies, and application areas. AI is generally thought of as computerized systems that work and react in ways commonly thought to require intelligence. The application of AI extends to areas such as natural language processing, facial recognition, and robotics. As the use of AI technologies has grown, so too have discussions of whether and how to regulate them. Potential regulatory options include a broad regulation of AI technologies that could be used across sectors, or a more targeted approach, regulating the use of AI technologies in particular sectors.

The bill:

- Requires an entity or person who produces or offers for use or interaction AI content or technology for a commercial purpose, and makes such content or technology available to the Florida public, to create safety and transparency standards that:
  - Alert consumers that such content or technology is generated by AI.
  - Allow such content or technology to be recognizable as generated by AI to other AI.
- Requires an entity or a person to provide a clear and conspicuous notice on its Internet homepage or landing page if it provides an AI mechanism to communicate or interact with Florida consumers for a commercial purpose.
- Prohibits any entity or person from knowingly using an image of an identifiable child in producing, generating, incorporating, or synthesizing child pornography through AI.
- Requires any state agency that uses AI to disclose if a person is interacting with AI when interacting with the agency and ensure that any confidential information accessible to an AI system remains confidential.

Any violation of the provisions of the bill by a person or entity is an unfair and deceptive trade practice actionable under FDUTPA solely by the Department of Legal Affairs at the Attorney General's Office. The bill does not establish a private cause of action.

The bill amends the definition of child pornography to include "any image or presentation produced, generated, incorporated, or synthesized through artificial intelligence that uses an image of an identifiable minor to depict or portray a minor engaged in sexual conduct," which makes using such technology for such purposes a crime.

The bill also creates an advisory council called the Government Technology Modernization Council to study and monitor the development and deployment of AI systems and provide reports on such systems to the Governor and the Legislature.

The bill has no fiscal impact on local governments, and an indeterminate fiscal impact on state government.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Artificial Intelligence

In the 1950s, a generation of scientists, mathematicians, and philosophers, including Alan Turing, conceptualized the possibility of artificial intelligence (AI). In his 1950 paper *Computing Machinery and Intelligence*, Turing discussed "how to build intelligent machines and how to test their intelligence."[1]

The term "artificial intelligence" itself was coined at the Dartmouth Summer Research Project on Artificial Intelligence, a conference held in 1956. Since 2010, there has been a lot of advancement in AI research, which has been attributed to the "availability of large datasets, improved machine learning approaches and algorithms, and more powerful computers."[2]

AI encompasses a large field of existing and emerging technologies, methodologies, and application areas. The Congressional Research Service has recently stated that AI is "generally thought of as computerized systems that work and react in ways commonly thought to require intelligence."[3] The application of AI extends to areas such as "natural language processing, facial recognition, and robotics."[4]

Generative Artificial Intelligence

Generative AI (GenAI) refers to "machine learning (ML) models developed through training on large volumes of data" for the purpose of generating new content, and has undergone rapid advancement over the past few years.[5]

GenAI, and subsets called large language models (LLMs) and generative adversarial networks (GANs), are developed through training on data sets, largely collected from public internet sites, in order to generate content. When a user provides a prompt, the model may generate text, image, video, and computer code responses with "human-like quality." The Congressional Research Service found that recent technological advances combined with the open availability of these tools to the public has led to widespread use.[6]

Specifically, to synthesize content, a GAN pits two neural networks—a generator and discriminator—against each other. Two scholars from the University of Texas at Austin describe the functionality as follows: "To synthesize an image of a fictional person, the generator starts with a random array of pixels and iteratively learns to synthesize a realistic face. On each iteration, the discriminator learns to distinguish the synthesized face from a corpus of real faces; if the synthesized face is distinguishable from the real faces, then the discriminator penalizes the generator. Over multiple iterations, the generator learns to synthesize increasingly more realistic faces until the discriminator is unable to distinguish it from real faces."[7]

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[1] Rockwell Anyoha, *Can Machines Think?*, Harvard University, Aug. 28, 2017, https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/ (last visited Jan. 20, 2024).
[2] Congressional Research Service, *Artificial Intelligence: Overview, Recent Advances, and Considerations for the 118th Congress, available at* https://crsreports.congress.gov/product/pdf/R/R47644 (last visited Jan. 20, 2024).
[3] *Id.*
[4] *Id.*
[5] *Id.*; *See also* Congressional Research Service, *Generative Artificial Intelligence: Overview, Issues, and Questions for Congress, available at* https://crsreports.congress.gov/product/pdf/IF/IF12426 (last visited Jan. 14, 2024).
[6] CRS, *supra* note 1.
[7] Sophie Nightingale and Hany Ford, *AI-synthesized faces are indistinguishable from real faces and more trustworthy*, Proceedings of the National Academy of Sciences of the United States of America (PNAS), Feb. 14, 2022, https://www.pnas.org/doi/10.1073/pnas.2120481119 (last visited Jan. 20, 2024).

Potential Benefits and Risks of Artificial Intelligence

According to PricewaterhouseCoopers, "AI technologies could increase global GDP by $15.7 trillion, a full 14%, by 2030," with health, retail, and financial services experiencing the most growth.[8] Some potential benefits include:

- **Financial sector** –The use of AI and algorithms in the financial sector may:[9]
  - Make decision-making more efficient, less emotional, and more analytic for investing, portfolio management, loan applications, mortgages and retirement planning.
  - Prevent fraud and detect financial anomalies in large institutions.
- **Health Sector** – The use of AI and algorithms in the health sector may:[10]
  - Help diagnose and predict disease or illness.
  - Help predict potential challenges and allocate resources to patient education, sensing, and proactive interventions to keep patients out of the hospital.
  - Create a multifaceted and highly personalized picture of person's well-being.
- **Transportation Sector** – The use of AI and algorithms in the transportation sector may:
  - Develop vehicle guidance, braking, and lane-changing systems for cars, trucks, buses, and drone delivery systems.
  - Develop systems to prevent collisions with the use of cameras and sensors.
  - Provide real-time information analysis and safety measures for the development of autonomous vehicles.
- **Government Sector** – The use of AI and algorithms in the government sector may:[11]
  - Help to create smart cities and e-governance. Examples include:
    - The George AI chatbot, a customer service virtual assistant created by the Georgia Department of Labor.
    - AI monitoring of live footage from cameras in forests and mountains for signs of smoke by western states including California, Nevada, and Oregon.
  - Help metropolitan areas adopt systems for citizen service delivery, urban and environmental planning, energy use, and crime prevention.
- **Customer Service** – The use of AI and algorithms in customer service may:[12]
  - Provide customer service to consumers through the use of chatbots and other customer service-oriented tools to increase customer engagement, resulting in increased sales opportunities with reduced costs to the business.

However, developments in AI raise important policy, regulatory and ethical issues. Potential risks are associated with removing humans from the decision-making process, as is the case when AI technology becomes more advanced over time.[13] Some potential risks include:

- **Bias:**[14]
  - Because AI algorithms are all based on data input by humans, and such data is based on human choices, responses or decisions, there is a risk that such algorithms can contain bias, inaccuracies, ethical considerations, and value choices, which can take many forms including historical, racial, or other discrimination, without intervention.
- **Workforce:**[15]
  - Integrating AI into the workforce brings uncertainty and challenge to the labor market, e.g., to what extent will AI replace jobs. There may need to be significant investments from business leaders and governments for retraining and reskilling the workforce.
- **Legal Liability:**[16]

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[8] National Conference of State Legislatures, *Approaches to Regulating Artificial Intelligence: A Primer*, Aug. 10, 2023, https://www.ncsl.org/technology-and-communication/approaches-to-regulating-artificial-intelligence-a-primer (last visited Jan. 20, 2024).
[9] *Id.*; Darrell West and John Allen, *How artificial intelligence is transforming the world*, Brookings Institute, Apr. 24, 2018, https://www.brookings.edu/articles/how-artificial-intelligence-is-transforming-the-world/ (last visited Jan. 20, 2024).
[10] NCSL, *supra* note 6.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

    - There are questions concerning who is legally liable when AI systems harm or discriminate against people, especially as new and emerging use cases for AI platforms are developed and integrated.
- **Security Risks:**[17]
    - AI systems present cybersecurity and national security risks, including:
        - AI companies collecting large amounts of personal data for AI training and use.
        - Bad actors developing advanced cyberattacks, bypassing security measures, and exploiting vulnerabilities in various private and public systems.
    - Traditional cybersecurity risk assessment tools are generally inadequate for addressing such risks.

Efforts to Regulate Artificial Intelligence

As the use of AI technologies has grown, so too have discussions of whether and how to regulate them. Potential regulatory options include a broad regulation of AI technologies that could be used across sectors, or a more targeted approach, regulating the use of AI technologies in particular sectors.[18]

In 2023, 31 states introduced at least 191 bills concerning AI, with 14 of the bills becoming laws.[19] As reported by the National Conference of State Legislatures:[20]

- Connecticut required the state Department of Administrative Services to conduct an inventory of all systems that employ AI and are in use by any state agency and, beginning Feb. 1, 2024, perform ongoing assessments of systems that employ AI and are in use by state agencies to ensure that no such system results in unlawful discrimination or disparate impact.
- Louisiana adopted a resolution requesting the Joint Committee on Technology and Cybersecurity to study the impact of AI in operations, procurement and policy.
- Maryland established the Industry 4.0 Technology Grant Program to assist certain small and medium-sized manufacturing enterprises with implementing new "industry 4.0" technology or related infrastructure. The definition of industry 4.0 includes AI.
- Texas, North Dakota, Puerto Rico, and West Virginia created AI advisory councils to study and monitor AI systems developed, employed or procured by state agencies.

Additionally, the following laws were passed in previous years:

- California prohibits any person from using a bot to communicate or interact with another person online with the intent to mislead the other person about its artificial identity in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election.[21]
- Illinois requires an employer that asks applicants to record video interviews and uses an AI analysis of applicant-submitted videos to:[22]
    - Notify each applicant in writing before the interview that AI may be used to analyze the applicant's facial expressions and consider the applicant's fitness for the position;
    - Provide each applicant with an information sheet before the interview explaining how the AI works and what characteristics it uses to evaluate applicants; and
    - Obtain written consent from the applicant to be evaluated by the AI program.

While there is no broad framework for AI regulation in the United States, federal laws on AI have been enacted over the past few years to guide actions within the federal government. For example, the

[17] *Id*; Bernard Marr, *The 15 Biggest Risks Of Artificial Intelligence*, Forbes, Jun. 2, 2023, https://www.forbes.com/sites/bernardmarr/2023/06/02/the-15-biggest-risks-of-artificial-intelligence/?sh=603d66292706 (last visited Jan. 20, 2024).
[18] CRS, *supra* note 2.
[19] National Conference of State Legislatures, *State of Play | An Inside Look at Artificial Intelligence Policy and State Actions*, Jan. 9, 2024, https://www.ncsl.org/state-legislatures-news/details/state-of-play-an-inside-look-at-artificial-intelligence-policy-and-state-actions (last visited Jan. 20, 2024).
[20] National Conference of State Legislatures, *Artificial Intelligence 2023 Legislation*, Jan. 12, 2024, https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation (last visited Jan. 20, 2024).
[21] Cal. B&P Code §§ 17940-17943
[22] 2019 IL Public Act 101-0260

National Artificial Intelligence Initiative Act of 2020, establishes the American AI Initiative and provides directions for AI research, development, and evaluation activities at federal science agencies.[23]

The European Union has proposed the Artificial Intelligence Act (AIA), which would create broad regulatory oversight for the development and use of a wide range of AI applications, with requirements varying by risk category, from banning systems with unacceptable risk to allowing free use of those with minimal or no risk.[24] In an effort to begin implementation of the AIA, a related new rule was agreed to in December, 2023, which includes requiring human oversight in creating and deploying the systems and banning indiscriminate scraping of images from the internet to create a facial recognition database.[25]

Artificial Intelligence Used to Create Child Pornography

Recently, there has been an increase in AI production of child pornography. Offenders may use downloadable open source GenAI and GAN models, which can produce images quickly, to devastating effects.[26] Hidden inside the foundation of popular AI image-generators are thousands of images of child sexual abuse, which have made it easier for offenders and AI systems to produce realistic and explicit imagery of fake children as well as transform social media photos of fully clothed children into child sexual abuse material (CSAM).[27]

In September, 2023, analysts at the Internet Watch Foundation (IWF) found in one dark web CSAM forum, a total of 20,254 AI-generated photos posted within the prior month. The analysts spent 87.5 hours assessing 11,108 of these images. In total, the IWF judged 2,978 images to be criminal. Most were realistic enough to be treated the same way as non-AI CSAM.[28]

Additionally, Stanford Internet Observatory recently found more than 3,200 images of suspected child sexual abuse in the giant AI database LAION, an index of online images and captions that's been used to train leading AI image-makers.[29]

Nishant Vishwamitra, an assistant professor at the University of Texas at San Antonio who is working on the detection of deepfakes and AI CSAM images online, stated that "the scale at which such images can be created is worrisome."[30]

Child Pornography Laws

Federal Law

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,[31] the United States Supreme Court (Supreme Court) recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. The Supreme Court noted that it was "unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."[32] Under these principles, states have criminalized possessing, distributing, and other acts involving child pornography. However, the constitutionality of

[23] CRS, *supra* note 2.
[24] Id; European Commission, *Regulatory Framework Proposal on Artificial Intelligence*, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai (last visited Jan. 20, 2024).
[25] Adam Satariano, *E.U. Agrees on Landmark Artificial Intelligence Rules*, NY Times, Dec. 8, 2024, https://www.nytimes.com/2023/12/08/technology/eu-ai-act-regulation.html (last visited Jan. 20, 2024).
[26] Matt Burgess, *The AI-Generated Child Abuse Nightmare Is Here*, Wired, Oct. 24, 2023, https://www.wired.com/story/generative-ai-images-child-sexual-abuse/ (last visited Jan. 20, 2024).
[27] Matt O'Brien and Haleluya Hadero, *Study shows AI image-generators are being trained on explicit photos of children*, PBS NewsHour, Dec. 20, 2023, https://www.pbs.org/newshour/science/study-shows-ai-image-generators-are-being-trained-on-explicit-photos-of-children (Last visited Jan. 21, 2024).
[28] *Id.*
[29] O'Brien and Hadero, *supra* note 27.
[30] *Id.*
[31] 458 U.S. 747 (1982).
[32] *Id.* at 762-63.

criminalizing such acts is less clear when the images at issue are morphed pornography, which is created when the innocent image of a child is combined with a separate, sexually explicit image, usually of an adult. The children depicted in these images were not harmed in the image, as they were not photographed while engaging in a sexual or obscene act.[33]

Child Pornography Prevention Action of 1996

Prior to 1996, federal law criminalized a variety of acts relating to child pornography.[34] At that time, federal statutes described images of a minor actually engaging in sexually explicit conduct.[35] In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),[36] creating a definition of "child pornography" that for the first time criminalized acts relating to morphed child pornography.

In 2002, the Supreme Court decided *Ashcroft v. Free Speech Coalition*,[37] a case in which a California trade association for the adult entertainment industry challenged the CPPA as unconstitutionally overbroad. A provision made it a crime to possess or distribute images depicting sexually explicit conduct which could be created by using advanced computer imaging techniques to "create realistic images of children who do not exist" (i.e., virtual child pornography).[38]

The Supreme Court held that the speech criminalized in the challenged provision of the CPPA violated the First Amendment since it extended the federal prohibition against child pornography to sexually explicit images that **"appeared to" depict minors but were "produced without using any real children."**[39] The Supreme Court decided that "by prohibiting child pornography that did not depict an actual child," the CPPA "abridged the freedom to engage in a substantial amount of lawful speech" and was therefore overbroad and unconstitutional.[40]

While the *Ashcroft* decision did not specifically address the constitutionality of the CPPA provision that prohibits *morphed* child pornography, it did note, in dictum, that **"[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children…"**[41] This suggests that morphed child pornography may not be protected by the First Amendment.[42]

Congress attempted to remedy the constitutional issues raised in *Ashcroft* by passing the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act" (Protect Act) in 2003.[43] The Protect Act, in part, narrowed the definition of virtual child pornography in the CPPA to include only virtual or computer-generated images that are "indistinguishable from" images of actual minors engaging in sexually explicit conduct.[44] The definition of morphed child pornography in the CPPA remained unchanged by the Protect Act.

To date, the federal statutes relating to morphed child pornography have been upheld.[45]

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[33] Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 Emory L.J. 909 (2019).
[34] *See*, e.g., 18 USC §2252 (1994 ed.).
[35] *U.S. v. Hotaling*, 599 F.Supp.2d 306, 309 (N.D.N.Y. 2008); *see also* 18 USC §§ 2252 and 2256 (1994 ed.).
[36] Pub. L. No. 104-208.
[37] 535 U.S. 234 (2002).
[38] *Supra*, note 8.
[39] *Supra*, note 9, at 256.
[40] *Id*.
[41] *Id*. at 242.
[42] *McFadden v. Alabama*, 67 So.3d 169, 181-82 (Ala. Crim. App. 2010).
[43] Pub. L. No. 108-21.
[44] 18 USC §2256(8)(B).
[45] In *United States v. Bach*, the defendant was convicted of possessing morphed child pornography. The image at issue showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection. The photograph of a well-known child entertainer's head had been "skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of the child entertainer sitting in the tree." The defendant appealed, arguing that his conviction was invalid because the definition of morphed child pornography violated the First Amendment. The United States Court of Appeals for the Eighth Circuit disagreed, holding that morphed child pornography "implicate[s] the interests of real children" and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity. *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005); *United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 567 (2012); *see also Doe v. Boland*, 630 F.3d 491, 497 (6th Cir. 2011); s*ee also United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2008), cert. denied, 132

In 2014, in *United States v. Anderson*,[46] the defendant was charged with distribution of morphed child pornography relating to an image in which the face of a minor female was superimposed over the face of an adult female engaging in sex with an adult male.[47] The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.[48] The court noted that in the image at issue "no minor was sexually abused."[49] However, the court held that because such images falsely portray identifiable children engaging in sexual activity, such images implicate the compelling governmental interest in protecting minors.[50] Using this reasoning, the court applied a strict scrutiny balancing test and held that the definition of morphed child pornography was constitutional as applied to the facts of *Anderson*.

In an MSNBC report, the U.S. Justice Department claims AI-generated CSAM may be prosecutable under existing federal child pornography laws. However, the U.S. Justice Department could not show such a prosecution to date.[51]

Florida Law

Currently, Florida law defines "child pornography" as:

- Any image depicting a minor engaged in sexual conduct; or
- Any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.[52]

Current law defines "sexual conduct" as:

- Actual or simulated[53] sexual intercourse, deviate sexual intercourse, sexual bestiality,[54] masturbation, or sadomasochistic abuse;[55]
- Actual or simulated 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, with the intent to arouse or gratify the sexual desire of either party; or
- Any act or conduct which constitutes sexual battery[56] or simulates that sexual battery is being or will be committed.[57, 58]

As it relates to child pornography, Florida law defines "identifiable child" as a person:

- Who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image; and
- Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.[59, 60]

S.Ct. 843 (2011) (citing *Bach*, the Court held that "child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment.).

[46] 759 F.3d 891 (8th Cir. 2014).

[47] *Id*.

[48] *Id*.

[49] *Id*. at 895.

[50] *Id*. at 896.

[51] Frank Figliuzzi, *A loophole makes it hard to punish these despicable AI-generated nude photos*, MSNBC, Nov. 7, 2023, https://www.msnbc.com/opinion/msnbc-opinion/ai-generated-nudes-new-jersey-students-rcna123931 (last visited Jan. 20, 2024).

[52] S. 827.071(1)(b), F.S.

[53] "Simulated" means the explicit depiction of conduct set forth in current law which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks. S. 827.071(1)(n), F.S.

[54] "Sexual bestiality" means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or female genitals of the other. S. 827.071(1)(k), F.S.

[55] "Sadomasochistic abuse" means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. S. 827.071(1)(i), F.S.

[56] "Sexual battery" means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, "sexual battery" does not include an act done for a bona fide medical purpose. S. 827.071(1)(j), F.S.

[57] S. 827.071(1)(l), F.S.

[58] A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct." *Id*.

[59] S. 827.071(1)(e), F.S.

[60] The term may not be construed to require proof of the actual identity of the identifiable minor. *Id*.

Florida law contains a variety of provisions prohibiting acts relating to child pornography, including under ch. 827, F.S., relating to "Abuse of Children," and ch. 847, F.S., relating to "Obscenity."

Current law makes it a:

- Second degree felony for a person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes child pornography. Possession of three or more copies of such photographs, etc., is prima facie evidence of a person's intent to promote.[61]
- Third degree felony for any person to knowingly possess, control, or intentionally view[62] a photograph, motion picture, or other image that, in whole or in part, he or she knows includes any child pornography.[63]
- Third degree felony for any person who knew or reasonably should have known that he or she was transmitting child pornography to another.[64]

Advisory Councils

Under Florida law, an "advisory council" means an advisory body created by specific statutory enactment and appointed to function on a continuing basis. Generally, an advisory council is enacted to study the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.[65]

The Code of Ethics for Public Officers and Employees[66] establishes ethical standards for public officials, which includes any person elected or appointed to hold office in any agency and any person serving on an advisory council.[67] The code is intended to ensure that public officials conduct themselves independently and impartially, and do not use their offices for private gain other than compensation provided by law. The code pertains to various ethical issues, such as ethics trainings, voting conflicts, full and public disclosure of financial interests, and standards of conduct.[68]

Florida Cybersecurity Advisory Council

The Department of Management Services (DMS) oversees information technology (IT)[69] governance and security for the executive branch in Florida.[70] The Florida Digital Service (FLDS) is housed within DMS and was established in 2020 to replace the Division of State Technology.[71] FLDS works under DMS to implement policies for information technology and cybersecurity for state agencies.[72]

An advisory council under Chapter 282, F.S., regulating communications, technology, and cybersecurity, is the Florida Cybersecurity Advisory Council (CAC) within DMS.[73] CAC assists state agencies in protecting IT resources from cyber threats and incidents.[74] The CAC must assist FLDS in

[61] S. 827.071(4), F.S.
[62] "Intentionally view" means to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation was viewed over any period of time. S. 827.071(1)(b), F.S.
[63] S. 827.071(5)(a), F.S. The statute also specifies that the possession, control, or intentional viewing of each such photograph, or other image, is a separate offense. If such photograph or other image includes child pornography depicting more than one child, then each child in each photograph or image that is knowingly possessed, controlled, or intentionally viewed is a separate offense.
[64] S. 847.0137, F.S.
[65] S. 20.03(7), F.S.; *See also* s. 20.052, F.S.
[66] *See* Part III, Chapter 112, F.S.
[67] S. 112.313(1), F.S.
[68] *See* Part III, Chapter 112, F.S.
[69] The term "information technology" means equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate information of any kind or form. S. 282.0041(19), F.S.
[70] *See* s. 20.22, F.S.
[71] Ch. 2020-161, L.O.F.
[72] *See* s. 20.22(2)(b), F.S.
[73] S. 282.319(1), F.S.
[74] S. 282.319(2), F.S.

implementing best cybersecurity practices, taking into consideration the final recommendations of the Florida Cybersecurity Task Force – a task force created to review and assess the state's cybersecurity infrastructure, governance, and operations.[75] The CAC meets at least quarterly to:

- Review existing state agency cybersecurity policies;
- Assess ongoing risks to state agency IT;
- Recommend a reporting and information sharing system to notify state agencies of new risks;
- Recommend data breach simulation exercises;
- Assist FLDS in developing cybersecurity best practice recommendations; and
- Examine inconsistencies between state and federal law regarding cybersecurity.[76]

The CAC must work with NIST[77] and other federal agencies, private sector businesses, and private security experts to identify which local infrastructure sectors, not covered by federal law, are at the greatest risk of cyber-attacks and to identify categories of critical infrastructure as critical cyber infrastructure if cyber damage to the infrastructure could result in catastrophic consequences.[78]

The CAC must also prepare and submit a comprehensive report to the Governor, the President of the Senate, and the Speaker of the House of Representatives that includes data, trends, analysis, findings, and recommendations for state and local action regarding ransomware incidents as stated below:

- Descriptive statistics, including the amount of ransom requested, duration of the incident, and overall monetary cost to taxpayers of the incident;
- A detailed statistical analysis of the circumstances that led to the ransomware incident which does not include the name of the state agency or local government, network information, or system identifying information;
- Statistical analysis of the level of cybersecurity employee training and frequency of data backup for the state agencies or local governments that reported incidents;
- Specific issues identified with current policy, procedure, rule, or statute and recommendations to address those issues; and
- Other recommendations to prevent ransomware incidents.

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.[79] FDUTPA was modeled after the Federal Trade Commission (FTC) Act.[80]

The Department of Legal Affairs (DLA) or the Office of the State Attorney (SAO) may bring actions on behalf of consumers or governmental entities when it is a matter of public interest.[81] The SAO may enforce violations of FDUTPA if the violations take place within its jurisdiction. The DLA has enforcement authority when the violation is multi-jurisdictional, the state attorney defers to the DLA in writing, or the state attorney fails to act within 90 days after a written complaint is filed.[82] In certain circumstances, consumers may also file suit through private actions.[83]

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[75] S. 282.319(3), F.S.
[76] S. 282.319(9), F.S.
[77] NIST, otherwise known as the National Institute of Standards and Technology, "is a non-regulatory government agency that develops technology, metrics, and standards to drive innovation and economic competitiveness at U.S.-based organizations in the science and technology industry." Nate Lord, *What is NIST Compliance*, DataInsider (Dec. 1, 2020), *https://www.digitalguardian.com/blog/what-nist-compliance* (last visited Jan. 20, 2024).
[78] S. 282.319(10), F.S.
[79] Ch. 73-124, L.O.F.; s. 501.202, F.S.
[80] D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083 (Summer 2011).
[81] S. 501.207(1)(c) and (2), F.S.; *see* s. 501.203(2), F.S. (defining "enforcing authority" and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period); *see also* David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUPTA and the potential for deterrence of anticompetitive conduct in Florida), *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division* (last visited on Jan. 6, 2024).
[82] S. 501.203(2), F.S.
[83] S. 501.211, F.S.

The DLA and the SAO have powers to investigate FDUTPA claims, which include:[84]

- Administering oaths and affirmations;
- Subpoenaing witnesses or matter; and
- Collecting evidence.

The DLA and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to $10,000 per willful violation.[85]

FDUTPA may not be applied to certain entities in certain circumstances, including:[86]

- Any person or activity regulated under laws administered by the Office of Insurance Regulation or the Department of Financial Services; or
- Banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation or federal agencies.

Effect of the Bill

Government Technology Modernization Council

The bill creates an advisory council the Government Technology Modernization Council (council) within DMS under Chapter 282, F.S.

The bill provides that the purpose of the council is to study and monitor the development and deployment of AI systems and provide reports on such systems to the Governor and the Legislature.

The bill requires the council to meet at least quarterly to:

- Assess and provide guidance on necessary legislative reforms and the creation of a state code of ethics for AI systems in state government.
- Assess the effect of automated decision systems on constitutional and other legal rights, duties, and privileges of residents of this state.
- Study the potential benefits, liabilities, and risks that this state, residents of this state, and businesses may incur as a result of implementing automated decision systems.
- Recommend legislative and administrative actions that the Legislature and state agencies may take to promote the development of data modernization in Florida.
- Assess where AI is deployed today.
- Evaluate common standards for AI safety and security measures.
- Assess how governmental entities and the private sector are using AI with a focus on opportunity areas for deployments in systems across this state.
- Determine how AI is being exploited by bad actors, including foreign countries of concern.[87]

The bill requires the council to submit annual legislative recommendations it considers necessary to modernize government technology to the President of the Senate and the Speaker of the House of Representatives any legislative, beginning June 30, 2024.

[84] S. 501.206(1), F.S.
[85] Ss. 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. S. 501.2105, F.S.
[86] S. 501.212(4), F.S.
[87] Section 287.138(1), F.S., lists the following as foreign countries of concern: People's Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolás Maduro, and the Syrian Arab Republic.

The bill requires the council to submit an annual comprehensive report that includes data, trends, analysis, findings, and recommendations for state and local action regarding ransomware incidents to the Governor, the President of the Senate, and the Speaker of the House of Representatives, beginning December 1, 2024. At a minimum, the report must include:

- A summary of recommendations by relevant national entities on technology systems in state government, including, but not limited to, AI, cloud computing, identity management, and financial technology.
- An assessment of the impact of using AI systems on the liberty, finances, livelihood, and privacy interests of residents of Florida.
- Recommended policies necessary to:
  - Protect the privacy interests of Florida residents from any decrease in employment caused by AI systems.
  - Ensure that residents of this state are free from unfair discrimination caused or compounded by the employment of AI systems.
  - Promote the development and deployment of AI systems in Florida.
- Any other information the council considers relevant.

The bill provides that the council is comprised of the following members:

- The Lieutenant Governor.
- The state chief information officer.
- The State Surgeon General.
- The Secretary of Health Care Administration.
- A representative of the computer crime center of the Department of Law Enforcement, appointed by the executive director of the Department of Law Enforcement.
- The Chief Inspector General.
- Thirteen representatives of institutions of higher education located in this state or the private sector with senior level experience or expertise in AI, cloud computing, identity management, data science, machine learning, government procurement, and constitutional law, with seven appointed by the Governor, three appointed by the President of the Senate, and three appointed by the Speaker of the House of Representatives.
- One member of the Senate, appointed by the President of the Senate or his or her designee.
- One member of the House of Representatives, appointed by the Speaker of the House of Representatives or his or her designee.
- The Secretary of DMS, or his or her designee, who serves as the ex officio, nonvoting executive director of the council.

The bill provides that members serve a term of 4 years, except that sitting members of the Senate and the House of Representatives serve terms that correspond with their terms of office.[88] A vacancy is filled for the remainder of the unexpired term in the same manner as the initial appointment. All members of the council are eligible for reappointment.

The bill provides that members of the council serve without compensation, but are entitled to receive reimbursement for per diem and travel expenses.[89]

Members of the council must maintain the confidential and exempt status of information received in the performance of their duties and responsibilities. A current or former member of the council must follow the Code of Ethics for Public Officers and Employees, and may not disclose or use information not available to the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity. Members of the council must sign an agreement acknowledging such requirements.

Artificial Intelligence Transparency

[88] For the purpose of providing staggered terms, the initial appointments of members made by the Governor are for terms of 2 years.
[89] As allowed under s. 112.061, F.S.

The bill provides that "artificial intelligence" means software that is developed with machine-learning, logic and knowledge-based, or statistical approaches and can, for a given set of human-defined objectives, generate or synthesize outputs such as content, predictions, recommendations, or decisions influencing certain environments.

The bill requires an entity or person who produces or offers for use or interaction AI content or technology for a commercial purpose, and makes such content or technology available to the Florida public, to create safety and transparency standards that:

- Alert consumers that such content or technology is generated by AI.
- Allow such content or technology to be recognizable as generated by AI to other AI.

If a natural person in Florida is able to communicate or interact with an entity or person for commercial purposes through an AI mechanism, the bill requires such entity or a person to provide a clear and conspicuous statement on its Internet homepage or landing page that such mechanism is generated by AI.

The bill prohibits any entity or person from knowingly using an image of an identifiable child in producing, generating, incorporating, or synthesizing child pornography through AI.

Any violation of the bill by a person or entity is an unfair and deceptive trade practice actionable under FDUTPA solely by DLA.[90] In addition to other FDUTPA remedies, DLA may collect a civil penalty of up to $50,000 per violation. DLA may also adopt rules to implement the bill.

The bill does not establish a private cause of action.

For purposes of bringing an action pursuant to the bill, any entity or person who produces or uses AI that is distributed to or viewable by the public in this state is considered to be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business, and doing business in this state, and is therefore subject to the jurisdiction of the courts of this state.

The bill requires any state agency[91] that uses AI to disclose if a person is interacting with AI when interacting with the agency and ensure that any confidential information accessible to an AI system remains confidential.

Criminal Acts

The bill amends the definition of child pornography to include any image or presentation produced, generated, incorporated, or synthesized through artificial intelligence that uses an image of an identifiable minor to depict or portray a minor engaged in sexual conduct, which makes using such technology for such purposes a crime

This definition will apply to criminal acts related to child pornography.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Creates s. 282.802, F.S.; creating the Government Technology Modernization Council.
Section 2: Creates s. 501.174, F.S.; providing requirements for entities using AI systems; providing penalties.
Section 3: Amends s. 775.0847, F.S.; amending a definition.

[90] Unlike under general FDUTPA actions, DLA is not prohibited from bringing an action against a social media platform that is also a:

- Person or activity regulated under laws administered by OIR or DFS; and
- Bank, credit union, and savings and loan association regulated by OFR or federal agencies.

[91] As defined in s. 282.318(2), which is any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government; the Justice Administrative Commission; and the Public Service Commission. The term does not include university boards of trustees or state universities.

Section 4: Amends s. 827.071, F.S.; amending a definition.
Section 5: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

There may be an increase in civil penalties collected by DLA.

2. Expenditures:

The bill may require additional expenditures for creating and running the council. There may be an increase of regulatory costs to DLA from enforcing the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will require entities that use AI in certain circumstances to provide disclaimers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,[92] the United States Supreme Court recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. Under these principles, states have criminalized possessing, distributing, and other acts involving child pornography. The constitutionality of criminalizing such acts when the images at issue are morphed pornography has generally been upheld,[93] but the constitutionality of criminalizing such acts when the images are generated or synthesized using AI from a database of identifiable children, but creating an image not of an identifiable child, is less clear.

B. RULE-MAKING AUTHORITY:

[92] 458 U.S. 747 (1982).
[93] *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005); *United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012), *cert. denied,* 133 S.Ct. 567 (2012); *see also Doe v. Boland,* 630 F.3d 491, 497 (6th Cir. 2011); s*ee also United States v. Hotaling,* 634 F.3d 725 (2d Cir. 2008), cert. denied, 132 S.Ct. 843 (2011).

The bill allows DLA to adopt rules related to enforcing provisions related to AI disclaimers, and use of AI in certain material.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES