KOSA sees widespread bipartisan Senate support but may stall in the House if passed

By Alec Snyder

08/04/2023 05:00 AM EDT

For the second consecutive year, the Senate has approved two children’s online privacy measures for floor consideration, just before departing for its month-long August recess.

In late July, the Senate Commerce Committee advanced a revamped version of the Kids Online Safety Act — landing it where the previous Congress’ version stalled in 2022. The current bill, S. 1409 (118), would require online platforms to design their products and services with kids’ safety as a top consideration. The bipartisan proposal comes from Sens. Richard Blumenthal (D-Conn.) and Marsha Blackburn (R-Tenn.), who co-sponsored KOSA in the 117th Congress as well.

To date, lawmakers have failed to pass a children's online safety bill or to update legislation on kid's privacy. In lieu of federal action, states like California have passed their own bills mandating tech platforms set stronger online safety protections for kids. However, Senate Majority Leader Chuck Schumer has vowed to pass legislation that enhances privacy protections for kids by the end of 2023, which would set KOSA up for a Senate vote in the second half of the year.

The bill faces opposition from a broad coalition of civil rights and LGBTQ+ groups and tech industry groups, with a key concern being the inclusion of age verification requirements that could put users’ privacy at risk. Even if the upper chamber passes the legislation, KOSA could still undergo further changes before potential enactment into law — perhaps even before the House can take a swing at it.

WHAT'S IN THE BILL?

This Pro Bill Analysis is based on the text of the bill as approved by the Senate Commerce Committee during its July 27 markup.

S. 1409 would require “covered platforms” — which the bill defines as social media services, online platforms, online video games, messaging applications and internet-connected video streaming services (Sec. 2) — to take “reasonable” measures to prevent and mitigate harm to minors, or those under the age of 17, including:

— Mental health disorders such as suicidal behavior, eating disorders, anxiety, depression and substance use disorders

— Patterns that encourage addiction-like behaviors

— Physical violence, online bullying and harassment of the minor

— Sexual exploitation and abuse

— Promotion of products that are unlawful for minors, such as narcotics, alcohol, tobacco and gambling

— Predatory or deceptive marketing practices and financial harm (Sec. 3).

However, it would not prohibit minors from deliberately seeking out related content or pursuing support services for any of these harms (Sec. 3).

The bill would require covered platforms to provide minors and their parents with safeguard controls to limit others’ ability to communicate with the minor, prevent other users from viewing the minor’s personal data, limit features that increase time spent on the platform, control personalized recommendations and restrict location sharing. Additionally, the platforms would need to provide easy-to-use options to either delete the minor’s account and any associated personal data or limit the amount
of time the minor spends on the covered platform. The platforms’ controls must default to the strongest possible option (Sec. 4, Subsection a).

It would also require covered platforms to provide parents with supervision tools to oversee their children’s activity — such as safety and privacy controls, tracking time on the platform and restricting purchases. If the platform can determine that a user is aged 12 or younger, it must automatically enable these supervision tools (Sec. 4, Subsection b).

The measure would direct covered platforms to establish an internal process to respond to reports submitted by parents, minors and schools, which must be addressed within seven days for platforms averaging more than 10 million active users per month or 21 days for those with less than 10 million (Sec. 4, Subsection c). Further, covered platforms would be barred from facilitating advertisements of narcotics, tobacco, gambling or alcohol to minors (Sec. 4, Subsection d).

The legislation would require covered platforms to provide parents and their children with “clear, conspicuous, and easy-to-understand” notice of the policies, practices and safeguards available to them (Sec. 5, Subsection a). Covered platforms using algorithmic recommendations would have to explain how the recommendation system is used, as well as options for minors and their parents to control those recommendations (Sec. 5, Subsection b). The platforms would also need to provide “clear, conspicuous, and easy-to-understand” information on why a minor received a specific targeted ad (Sec. 5, Subsection c).

The Kids Online Safety Act would require all covered platforms to issue an annual public report identifying risks to minors — to be based on an independent, third-party audit conducted through “reasonable” inspection of the platform. The report would need to include an assessment of how likely the platform is to be accessed by minors, the number of users believed to be minors and an accounting of reports received regarding harm to minors, among other elements — as well as findings on the platform’s prevention and mitigation measures for minors (Sec. 6).

An adopted amendment from Rep. Ben Ray Luján (D-N.M.) would also require that the report include the amount of content consumed in English and the top five non-English languages, along with any distinctions in safeguards provided and risks posed to minors using these services in English and the top five non-English languages.

Only platforms that primarily act as a community forum and average at least 10 million monthly users in the most recent calendar year would be subject to these audits (Sec. 6).

S. 1409 would require the FTC to enter into a contract with the National Academy of Sciences within one year of its enactment, under which the academy — in consultation with HHS — would be required to carry out at least five “scientific, comprehensive” studies and reports on the risk of harm that social media and other online platforms pose to minors (Sec. 7, Subsection b).

Specifically, the studies would need to explore the relationship between social media and other online platforms and (Sec. 7, Subsection c):

— Anxiety, depression, eating disorders, and suicidal behaviors

— Substance use disorders and minors’ use of narcotic drugs, tobacco products, gambling, or alcohol

— Sexual exploitation and abuse

— “Addiction-like” use of social media and design factors that lead to unhealthy and harmful overuse of social media.

Additionally, the measure would require the FTC, in consultation with the Commerce Department, to issue guidance for covered platforms that seek to conduct market- and product-focused research on minors (Sec. 8).

KOSA would require NIST, in coordination with the FCC, FTC and the Commerce Department, to evaluate the “most technologically feasible” options for developing systems to verify a user’s age through either their device or operating system and report its findings to Congress. During the mark-up, lawmakers adopted an amendment from Sen. Cynthia Lummis (R-Wyo.) that would require this report to include information on the impact of different age verification systems on competition and whether those systems could create barriers for smaller companies, as well (Sec. 9).

The legislation would require the FTC to work with the Kids Online Safety Council — established under Sec. 12 of this measure — to issue guidance to provide covered platforms and auditors with information and examples of features that extend minors’ use of covered platforms, possible misuse of parental tools and methods for evaluating the effectiveness of the safeguards, among other matters (Sec. 10).
It would also specify that the FTC and state attorneys general oversee enforcement of this bill (Sec. 11).

S. 1409 would require the Commerce Department to create and assemble a Kids Online Safety Council to advise on implementing the bill’s provisions, with the council consisting of (Sec. 12):

— Parent and youth representatives
— Those with an expertise in mental health and preventing harm to minors
— Experts with a background in privacy and civil liberties
— Representatives of various covered platforms
— Representatives from the National Telecommunications and Information Administration, National Institute of Standards and Technology, FTC, DOJ and HHS
— State attorneys general
— Educators
— Representatives from communities of socially disadvantaged individuals.

The legislation would take effect 18 months after enactment (Sec. 13) — with the stipulation that if any part of the measure is deemed unconstitutional, the rest of the bill’s provisions would not be affected (Sec. 15)

Finally, the bill would incorporate provisions from the Filter Bubble Transparency Act from Sen. John Thune (R-S.D.), which would require online platforms to notify users if they use algorithms based on the user’s data and direct them to make a version of their platform available that only utilizes the user’s explicitly permitted data, as well as the ability to switch between these versions of the platforms.

WHO ARE THE POWER PLAYERS?

Sens. Richard Blumenthal (D-Conn.) and ranking member Marsha Blackburn (R-Tenn.) co-sponsored the bill. It has a total of 43 co-sponsors in the Senate, with a near even split of 21 Democrats and 22 Republicans.

Sen. Ed Markey (D-Mass.) sponsored similar legislation — S. 1418 (118), the Children and Teens’ Online Privacy Protection Act — which the Senate Commerce Committee also approved for the floor in the same markup.

The committee voted to adopt Sen. John Thune (R-S.D.)* amendment to KOSA, which would incorporate the Filter Bubble Transparency Act from last Congress to require greater transparency from tech platforms.

Separately, Sen. Brian Schatz (D-Hawaii) offered his own bill — the Protecting Kids on Social Media Act, which would ban kids under age 13 from accessing social media and would require parental consent for kids ages 13-17 to access apps — as an amendment to KOSA but withdrew it saying he’ll work with committee leadership on a future markup.

Commerce Chair Maria Cantwell (D-Wash.) and ranking member Ted Cruz (R-Texas) said they both wanted to work with Schatz to amend the draft for future consideration.

Blumenthal and Blackburn have said that the Kids Online Safety Act has been endorsed by several groups “representing mental health experts, nurses, parents’ groups, young people, consumer advocates, faith groups, tech experts, and other communities,” including Common Sense Media, the American Psychological Association, the American Academy of Pediatrics, American Compass, the Eating Disorders Coalition, Fairplay, Mental Health America and the Digital Progress Institute.

Blamour later added statements from leaders at the National Center on Sexual Exploitation, the director of the National Marriage Project, the Children and Screens: Institute of Digital Media and Child Development, Wired Human, Consumer Reports, the Organization for Social Media Safety, the Parents Television and Media Council and Heritage Action, along with several parent and youth advocate testimonials.
However, Democratic leaders on the committee echoed concerns from the LGBTQ community around KOSA. More than 90 civil rights organizations — including the ACLU, the American Library Association, GLAAD, GLSEN, the National Center for Lesbian Rights, the Human Trafficking Prevention Project, the Internet Society, Ranking Digital Rights, the Tor Project, the Wikimedia Foundation, New America’s Open Technology Institute and the National Health Care for the Homeless Council — signed a letter to Commerce Committee leadership in November indicating their opposition to KOSA.

In an accompanying release through the Center for Democracy & Technology, the signatories said that, despite what they consider to be the bill’s good intentions, it could “harm LGBTQ+ youth especially, and could be weaponized by Attorneys General to censor online resources and information for queer and trans youth, people seeking reproductive healthcare, and more.”

The Computer & Communications Industry Association also submitted a letter before the bill’s markup, in which it argued that, if passed, KOSA “would lead to broad restrictions of online speech, contain vague knowledge standards, and would create confusing compliance problems for businesses’ efforts to protect young people online.”

WHAT'S HAPPENED SO FAR?

The push for the Kids Online Safety Act in the 117th Congress came in the wake of a September 2021 Wall Street Journal report, which found that Facebook executives were aware that Instagram — which Meta owns, along with Facebook — knew of the platform’s “toxic” impact on children and adolescents, with an emphasis on the adverse influence Instagram can have on teenage girls.

In the aftermath of the report and its fallout, former Facebook employee Frances Haugen came forward to share her experiences at the company before her May 2021 departure, saying that Facebook “optimizes” content that draws a reaction. She also said the company understands that hateful content is more likely to do that than more pleasant material does.

In February 2022, Blumenthal and Blackburn introduced the original KOSA measure. Blumenthal said at the time that Big Tech “brazenly failed children and betrayed its trust, putting profits above safety,” adding that their measure would address the adverse effects social media has had on children by “setting necessary safety guiderails for online platforms to follow that will require transparency and give parents more peace of mind.”

The bill then idled in the Senate until late July 2022, when the Senate Commerce Committee marked up and unanimously approved S. 3663 for Senate floor consideration. There was speculation that the fiscal 2023 omnibus could include KOSA as a policy rider, but it failed to latch on, and the bill died before the start of the 118th Congress.

In his 2023 State of the Union address, President Joe Biden called on Congress to pass legislation to enhance children’s online privacy, and that push eventually manifested in Blumenthal and Blackburn reintroducing KOSA on May 2.

Biden reiterated his call to action last month and the Senate Commerce Committee marked it up days later on July 25, where the committee approved by voice vote the amended bill for the floor, just before breaking for the August recess.

WHAT'S NEXT?

Despite KOSA advancing out of committee, Cantwell said the bill — in addition to Markey’s proposal, dubbed COPPA 2.0 — still needs work, with Markey saying he wants to “fix the concerns that the LGBTQ community has been raising.”

Cruz said during the markup that although he favors some of the changes made, he wants to see further tweaks to the bill before a floor vote, including a provision in KOSA codifying that it won’t preempt state law.

Nevertheless, Schumer has listed kids’ safety bills as a priority for Senate passage by year’s end. Cantwell also noted that passing the kids’ safety bills in the Senate is the top goal this fall: She said Schumer could potentially move KOSA and COPPA 2.0 together along with several kids’ online safety bills that advanced out of the Senate Judiciary Committee earlier this summer.

Whether KOSA will go anywhere in the House remains unclear, but the GOP-led lower chamber hasn’t prioritized children’s online privacy as a standalone issue. Last year, the kids’ safety bills faced opposition from some lawmakers in the House, who argued that their own comprehensive federal data privacy bill — the American Data Privacy and Protection Act — was the preferred measure to boost safety and privacy for kids and adults, alike.
WHAT ARE SOME STORIES ON THE BILL?

Read POLITICO news on S. 1409.

Rebecca Kern, Mallory Culhane, Alfred Ng and Brendan Bordelon contributed to this report.