



TEXAS PUBLIC POLICY FOUNDATION

BETTER TECH FOR TOMORROW

THE PROBLEM

Texans are rightly concerned with the enormous harms being done to their children on social media. However, due to an outdated federal law, the Children’s Online Privacy Protection Act (COPPA), states are handcuffed in what they can do to protect children online. What is COPPA, why does it limit Texas from protecting children online, and what can the 88th Legislature do about it?

FEDERAL LAWS ARE BOTH INADEQUATE TO PROTECT OUR KIDS AND ACTIVELY INTERFERE WITH STATE EFFORTS TO GO FURTHER.

- COPPA is failing to protect our children. Over 40% of children under 13 use multiple social media platforms daily, even as tech companies collect data on them in blatant defiance of the law.
- Worse, because of its preemption clause, COPPA limits the Texas Legislature from passing stronger laws to protect all children online.
- While federal reform of COPPA is urgently needed, in the meantime, there is much Texas can do.



40% of children under 13 use multiple social media platforms daily

WHAT IS COPPA AND WHAT DOES IT DO?

- COPPA was passed in 1998 to protect children from harmful material online and to ensure companies had verifiable parental consent to gather data on children.
- Colloquially, the law “prohibits American companies from collecting personal information from children under 13 without parental consent or to collect more personal information than they need to operate a service aimed at children under 13.”
- The cheapest and simplest way for a general audience website to comply with the law is to ensure you never knowingly have a child on your service at all. That is why many social media companies, such as Facebook, nominally require all users to be at least 13 years of age.

WHY IS COPPA FAILING?

- A third of children as young as seven- to nine-years-old use social media, despite federal law and terms of services purportedly preventing them from doing so. This is because of weak enforcement mechanisms and the “actual knowledge” standard.
- The FTC states “COPPA covers operators of general audience websites or online services only where such operators have actual knowledge that a child under age 13 is the person providing personal information. The Rule does not require operators to ask the age of visitors [emphasis added].”
- This is a perverse incentive because it allows firms to claim compliance with the law simply by ensuring they never know the true ages of their users.

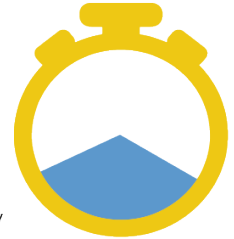
- The age of consent is both too low and not adequately enforced: “In Germany, Ireland, and Switzerland for example, the age of digital consent is set at 16, with more legal requirements in place for age verification.”
- Even when the FTC chooses to pursue an alleged violation, fines are usually minimal. Only once has a fine in excess of six million dollars been imposed, which is hardly a deterrent to a social media firm with billions of dollars in revenue.

THE SOLUTION

WHAT CAN THE FEDERAL GOVERNMENT DO TO FIX COPPA?

- Congress should reform COPPA to give it stronger teeth and make it easily enforceable.
- Remove the preemption provision which prevents states from enacting strong laws to protect kids online.
- Replace the actual knowledge standard with a stricter standard such as constructive knowledge.

Fully 35% of teens say they are using at least one of the major social media platforms almost constantly



Raise the age threshold in COPPA to 18 years old. However, raising the age threshold without fixing the preemption and stricter enforcement standards would merely serve to further muddle state reform efforts.

WHAT CAN TEXAS DO, BARRING ANY REFORMS TO COPPA?

- Whether or not the federal government reforms COPPA, the Legislature can still take actions on its own.
- While federal courts have not resolved the constitutionality of COPPA nor addressed the preemption provision, the FTC argued in a brief that nothing “in COPPA’s language, structure, or legislative history indicates that Congress intended for that law to preempt state law privacy protections for people outside of COPPA’s coverage, including teenagers.”
- Texas could potentially apply similar, or even stricter, protections for 13- to 18-year-olds, who are not covered under COPPA.
- Our research paper concludes that the best way to protect kids online is to recognize social media as an age-limited harmful product—like cigarettes, alcohol, or slot machines—and prevent social media companies from granting access to 13- to 18-year-olds.

CONCLUSION

- Despite weak and anti-states’ rights federal laws, Texas still has broad police powers to protect children from the rampant dangers of social media.
- As TPPF writes in a forthcoming paper: “there is ample room under COPPA for state action to better protect children from the harms of social media, including treating this as a harmful product and prohibiting companies from granting access to children.”
- While lawmakers need to be aware of COPPA and the limitations it places on state solutions, it by no means forecloses all possible routes of action.

