



Soft Law and Emerging Technology in the States

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Technological innovation is moving faster than ever before, and society is adopting new technologies at a quicker and quicker pace. Still, policy solutions continue to move at largely the same pace they always have. This is commonly known as the “pacing problem.” In some cases, this disconnect can serve as a benefit that allows technology to emerge

without undue restrictions but, other times, the pacing problem can prevent technological adoption and innovation. So the question is, how can policymakers enable innovation and encourage new technologies when traditional policymaking seems unable to keep up?

As Ryan Hagemann, Adam Thierer, and I document in a recent law review article,

policymakers are turning to less formal and more flexible policymaking tools, which we refer to as “soft law,” to handle a wide variety of emerging technologies from autonomous vehicles and drones to advanced medical technologies and 3D printing.¹ While our paper focused on the use of soft law at the U.S. federal level, soft law mechanisms are also used as a tool for technology policy at the state and local level.²

In this essay, drawing on my paper with Hagemann and Thierer, I will introduce the concept of soft law and its use as a type of policy solution for fast-moving, emerging technologies. Next, I will provide examples of how states have utilized these soft law mechanisms. Then I will conclude by detailing some of the concerns regarding the potential abuse of soft law as well as possible ways to mitigate some of these concerns.

What is Soft Law?

Rules and regulations that guide and govern a policy area are no longer as clear-cut as they once were. Increasingly, a wide range of policies are made not through the more formal processes of legislation and regulation, but by sub-regulatory actions like non-binding guidance, multistakeholder processes, sandboxing, or the establishment of informal norms.³ These soft law mechanisms exist on a spectrum of formality and provide a range of certainty.⁴

In many cases, these tools can serve as a way of signaling that regulators will allow an innovation to continue to develop, while also providing both regulators and innovators much-needed flexibility during this development process. But such actions

also require a degree of regulatory humility that recognizes imperfect knowledge and solutions. Regulators must be willing to think beyond potential worst-case scenarios and consider the benefits brought by positive use cases as well.

While agencies seem to be using these new tools more and more, particularly with regard to emerging technologies, it is difficult to know exactly how many “soft law” actions have been undertaken. As Clyde Wayne Crews’ work on “regulatory dark matter” points out, the sub-regulatory and amorphous nature of such policy tools can make it difficult to truly count or quantify their impact.⁵ Yet, there are several notable examples at both the state and federal level of soft law acting as a policy solution for emerging technologies where traditional hard law has been ineffective.

New technologies pose challenges to existing regulatory functions in several ways. Notably, as discussed in the introduction, the pace of technological innovation often leaves existing policy tools struggling to adapt. This lack of adaptation will become a problem due to its propensity to allow for static, and often quickly outdated, rules that could prevent innovation. But the pacing problem is not the only reason for the emergence of soft law mechanisms. There are other reasons it has become a preferred tool for dealing with emerging technologies.

Many technologies blend or defy existing categories, forcing policymakers to take a new look at policy solutions that may require a more flexible and adaptive approach. Technologies are also increasingly able to seek out more favorable regulatory regimes⁶ or act first and seek

policy approval later.⁷ Sometimes the policy reaction to such disruption has been swifter and stricter as policymakers react to this evasion. This has played out particularly with regard to the sharing economy and micromobility devices.

While technological disruption free from any regulation may at times seem ideal to advocates of free markets, technologies rarely stay unregulated. Soft law can provide a pragmatic solution that is less restrictive than formal, traditional regulation. In doing so, it can offer certainty, clarity, legitimacy, and accountability to both innovators and regulators while remaining adaptive and allowing trust to develop between consumers, innovators, and regulators for new technologies.⁸ Soft law is far from perfect, but examining its usage in various forms for emerging technology can also reveal its usefulness as a policy tool.

Examples of Soft Law in Action

States and localities experiment with soft law mechanisms in various ways for many emerging technologies. Recent examples include less restrictive ways of regulating the testing and deployment of autonomous vehicles, sandboxes to allow new financial products, and various soft law tools in the deployment of micro-mobility devices like scooters.⁹

Currently, states have deployed a wide range of regulatory regimes when it comes to the development and testing of autonomous vehicles. They range from highly restrictive, as in California, to more permissive, as in Florida.¹⁰ Innovators are typically drawn to states that employ a more permissive regulatory approach in which

innovation is “presumed innocent” and permitted until it is proven harmful.¹¹ In many states, allowing autonomous vehicle testing and creating a system for their operation and deployment is done through formal legislation, rulemaking, or executive orders.¹² Pennsylvania, however, has taken a more soft law focused approach.¹³ This approach establishes a degree of certainty and encourages innovators and regulators to work together to determine best practices while retaining flexibility as the technology evolves.¹⁴ While this approach has many benefits over more traditional regulatory approaches, it still raises concerns about enforceability.¹⁵ Still, such an approach can be a highly beneficial alternative when states encounter difficulties in traditional regulatory processes that could impede important innovations.

The recent micro-mobility trend, particularly the emergence of dockless electric scooters, also provides examples of soft law in some localities. While some cities have banned the scooters outright over concerns, other local governments have taken a variety of more flexible approaches, including launching sandbox-style pilot programs or other more adaptive policy responses.¹⁶ While in many cases scooter launches have resembled previous sharing economy transportation platforms like Uber and Lyft, these collaborative agreements with companies allow policymakers and innovators to develop norms and terms of use for factors such as parking, use of rights of way and sidewalks, and safety.¹⁷ These agreements, unlike flat-out bans, encourage collaboration. This allows innovative entrepreneurs to respond to a

city's needs while also addressing legitimate concerns held by regulators. They also signal that policymakers are open to new, innovative ideas and willing to work with these emerging transportation options in a flexible way rather than simply regulating them away.¹⁸

Finance is typically one of the most regulated industries, but FinTech, blockchain, and other emerging technologies could solve many problems in providing financial services. However, issues arise as these innovations often fall outside of traditional categories and can be closed off by pre-existing regulations. Now, however, some states are working collaboratively with these innovators via sandboxes that allow products to launch and test without certain regulatory burdens that might deter or prohibit innovation.¹⁹ Like many soft law options, these testing grounds are not free from concerns. As my colleague Brian Knight describes, positive sandboxes use such innovative regulatory mechanisms in a way that protects consumers and benefits the public.²⁰ They also maintain an accessible and voluntary regulatory option for innovators so that more solutions will be able to enter the market and provide new options that might have otherwise been unavailable.²¹

These are not the only ways that policymakers are using soft law to respond to emerging technologies, but they provide some good examples of the beneficial ways states are taking a flexible approach that can allow innovation to flourish.

Mitigating the Problems of Soft Law

While soft law has probably been beneficial as a governing mechanism for emerging technologies when compared to clunky and static traditional hard law mechanisms, it still raises concerns. If the potentials for soft law abuse are fully realized and substantively considered before it is pursued, then, ideally, good governance would be able to mitigate these risks while maximizing its benefits.

Perhaps the most obvious risk is that soft law could merely allow the administrative state to grow larger while imposing even fewer checks on power than more formal regulatory mechanisms. This is a legitimate concern and highlights why substantive checks are necessary to ensure that soft law does not devolve into soft despotism.²² The courts can play a unique role in checking agency power and insuring those impacted have a means of redress when agency action, via either soft or hard law, crosses the line. In many ways, states have taken the lead in allowing courts to scrutinize agency actions in a truly thorough manner. While the federal courts provide varying levels of deference to administrative agencies under existing precedents²³, some states have removed agency deference while others never adopted such requirements in the first place.²⁴ For example, in 2018, Florida voters passed an amendment that ended the state's judicial deference to state agency interpretations.²⁵ In freeing courts from such requirements, these states also provide an example of what might happen on the federal level if deference was weakened or removed.

Of course, not all concerns relate to the role of the administrative state. As my Mercatus colleague Brian Knight has pointed out in his work on FinTech sandboxes, soft law that prioritizes one firm over another has the risk of becoming anti-competitive rather than expanding the market via new innovations.²⁶ Such a risk is not limited to FinTech but can occur in any scenario where the benefits created by soft law are limited to a specific number of players. For example, a similar example could be observed in limiting the number of companies able to participate in a dockless scooter pilot program. Policymakers can mitigate such concerns by allowing this regulatory flexibility to be accessed by all innovators who meet a basic set of qualifications and not privileging those who participate in the program by labeling them a “good firm.”²⁷

In many cases, if soft law proves to be successful, the response would not be to mandate additional regulatory requirements but to assess broader deregulatory possibilities for more traditional players in the industry.²⁸ Ideally, soft law might be coupled with broader regulatory reform actions to rein in the administrative state and its power.²⁹ This would help mitigate concerns about overregulation. Additionally, the assumption should not be that a successful use of soft law always requires more formal regulation, but also that it could show examples of where existing regulations may prove to be unnecessary in traditionally-regulated industries.³⁰

Conclusion

Technology is rapidly changing and developing, and the regulatory response to it should as well. In many cases, particularly at a state level, policymakers, recognizing the benefits of disruptive innovation, have embraced a more flexible regulatory approach via soft law. Rather than seeking to keep pace via static regulation that risks either being too late to prevent harms or so stringent as to prevent innovation, a soft law approach requires a degree of regulatory humility that can create a more balanced regulatory framework in a time of rapid change. There are certainly concerns surrounding how soft law, like many other policy tools, could be abused. However, substantive checks from both the other branches of government and the structure of the policies themselves can help mitigate those risks while maximizing the potential benefits that could be gained from this approach.

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