

that is missing from the ADPPA and Cantwell proposals. It is important to have a general duty as a catch-all standard so the law can evolve with the times. It's no coincidence the reason both the U.S. Federal Trade Commission's "unfair and deceptive trade practices" and the Fourth Amendment's "unreasonable searches and seizures" standards have been able to keep up with the march of technology is because they have also been phrased in general terms. A general duty of data loyalty would work in a similar way — and it would give the lie to the frequently heard statement that "law can't keep up with technology." Law can keep up with technology, but only if we impose general, flexible standards rather than specific rules that can become outdated as technology changes.

In "Legislating Data Loyalty (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4131523)," we develop this general rule, emphasizing the importance of a "no conflict" rule, the prioritization of people over profits and the collective best interests of trusting parties. At the same time, a good duty of data loyalty must have some of those specific rules, like the ones the ADPPA calls "loyalty duties." Such rules can offer the specificity that targeted regulation supplies and can regulate more heavily in the specific contexts where we believe disloyalty is more likely to happen or more likely to be harmful. Using the two-step model from fiduciary law, we suggest certain subsidiary data loyalty rules targeting the five most-likely areas ripe for disloyal and harmful self-dealing.

We think five separate areas call for such specific rules. First, there is "Collection," the act of collecting, recording and deciding to keep data about a person. Strong data minimization rules would fall in this category. Second, there is "Personalization," the act of treating people differently based on personal information or characteristics. Strict anti-discrimination and anti-subordination rules along with prohibitions on certain kinds of cross-contextual behavioral advertisements like those targeted in the California Consumer Privacy Act would be responsive to this context. Third, there is "Gatekeeping," the extent to which trusted entities allow third parties to access people and their data. Robust data security, confidentiality and deidentification rules would be appropriate here.

The fourth context is "Influence," where companies leverage technologies to exert sway over people to achieve results. Here, anti-dark patterns rules would be helpful. We recommend adopting a rule based on the Consumer Financial Protection Bureau's prohibition on abusive trade practices, which [prohibits \(https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf\)](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf) taking unreasonable advantage of unformed trusting parties, the inability of people to protect themselves from exposure, or the reasonable reliance by trusting parties that an organization is acting in their interests. Finally, there is "Mediation," which concerns the way organizations design their platforms to facilitate people interacting with each other. Here we recommend creating anti-harassment and disinformation design rules. These subsidiary rules would not solve all problems of data and platform power, but they would engage with problem areas in a specific enough way to resist inevitable efforts to dilute the general loyalty obligation.

Loyalty skepticism

Many people in industry and Congress are skeptical of loyalty duties for data. They fear that they might be burdensome or might "stifle innovation" and make it harder for companies to bring new products to market. In our article "The Surprising Virtues of Data Loyalty," we [argue \(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921799\)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921799) that nothing could be further from the truth. Properly understood and implemented, loyalty duties for data can promote fair competition and put the right incentives on companies to provide even better products. By taking manipulation, betrayal and self-dealing off the table, loyalty duties allow companies to compete on products that are good for their customers, building trust and sustainable, long-term relationships.

Consider how long you have had a relationship with large companies like Apple or Microsoft through your iPhone or use of Microsoft Word. Loyalty rules reward this kind of long game, ensuring the "I Agree" button isn't a trap. For new companies, loyalty duties mean they can focus on providing truly valuable products and services without fear that their competitors will be using manipulative or other disloyal models to get ahead of them. And if we really believe in the power of innovation, shouldn't we have some faith in it? After all, as the old proverb puts it well, necessity is the mother of invention. And if the only way a company can make money is through disloyal data practices, then we should celebrate the failure of this business model.

And we can't wait to see what kinds of loyal, sustainable, long-term information products companies subject to a duty of loyalty can produce. In this way, by encouraging the development of good products at a good price and by promoting competition on service rather than manipulation or data extraction, a duty of loyalty can be good for businesses as well as protecting vulnerable consumers. Lawyers have been subject to a duty of loyalty for centuries and it hasn't prevented the delivery of legal services and instead built trust in the profession.

As technology companies become ever more intertwined with our lives, as they know our secrets and vulnerabilities even more than our lawyers and doctors do, it's time to give them the kinds of mature duties those professionals have thrived under for centuries. As the pending bills have recognized, it's time for a duty of data loyalty. All we ask is that when we impose data loyalty duties, we do them the right way so we can build the kind of trust in our digital society that we deserve — in a way that is good for everyone in the long term. Lawmakers are a stone's throw away from fully realizing the potential for data loyalty. Let's help them get it right as we make a historic push for privacy.