SOCIAL MEDIA COMPANIES SHOULD PURSUE SERIOUS SELF-SUPERVISION — SOON:
RESPONSE TO PROFESSORS DOUEK AND KADRI

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We understand why eighty-two percent of Americans regularly use social media.1 Social media networking platforms offer speedy communication and entertainment at no immediate cost to users. But they also produce problems widely acknowledged by groups that otherwise diverge or even disagree. Democrats and Republicans, adults and teens, national security experts, and parents alike2 have criticized social media because it is addictive, is associated with depression and anxiety,3 propels misinformation and disinformation,4 and poses national security concerns.5 The bullying, unrealistic presentations of body image, and high-risk activity challenges propelled through social media sites increase

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2 Monica Anderson et al., Teens’ Views About Social Media, PEW RSCH. CTR. (Nov. 16, 2022), https://www.pewresearch.org/internet/2022/11/16/2-teens-views-about-social-media [https://perma.cc/578G-H3NB] (“[T]eens’ views are different when the question involves the impact of social media on all teens. About a third of teens (32%) say social media is mostly negative for people their age, compared with about a quarter (24%) who think the effect has been mostly positive.” (emphasis omitted)); Cat Zakzewski, Senators Unveil Children’s Online Safety Bill After Months of Pressure on Silicon Valley, WASH. POST (Feb. 16, 2022, 6:00 AM), https://www.washingtonpost.com/technology/2022/02/16/kids-online-safety-act-unveiled-blackburn-blumenthal [https://perma.cc/6LJ6-DY5T] (Democrats and Republicans); Rachel Treisman, The FBI Allege TikTok Poses National Security Concerns, NPR (Nov. 17, 2022, 12:37 PM), https://www.npr.org/2022/11/17/1137155540/fbi-tiktok-national-security-concerns-china [https://perma.cc/H9RB-AVL6] (national security experts).

3 See, e.g., Luca Braghieri et al., Social Media and Mental Health, 112 AM. ECON. REV. 3660, 3661 (2022).

4 See, e.g., Michela Del Vicario et al., The Spreading of Misinformation Online, 113 PROC. NAT’L ACAD. SCI. U.S. 554, 558 (2016).

5 See, e.g., Treisman, supra note 2.
mental health harms for many users.⁶ Even social media companies acknowledge they face problems that they cannot handle by themselves.⁷ Amid clashing ideas about government regulation — including some promising ideas, many of which are unlikely ever to become laws — greater and more thoughtful self-regulation by the social media companies would be a wise and productive step. History suggests some missed opportunities. The United States government failed to encourage, and even forbade as anticompetitive, a proposal from the National Association of Broadcasters (NAB) to self-regulate by capping advertisements per hour in the early 1960s.⁸ That missed opportunity and other self-regulatory efforts offer lessons for this moment, when national governmental action is especially unlikely given partisan divides.⁹ Hence, the time is ripe for advocacy groups and governmental actors to explore industry self-regulation avenues for social media’s targeted ads and content moderation.

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Professor Evelyn Douek recently raised important criticisms of the judicial-style thinking infusing the “Facebook Oversight Board” created by the company now known as Meta.¹⁰ Professor Thomas Kadri expanded on this caution by demonstrating how the juridical focus in Meta’s self-regulation entrenches its own power.¹¹ Kadri urges skepticism about any potential contribution of industry self-regulation to the welfare of users, but nonetheless sketches a mix of internal and external regulatory measures to “foster[] healthier digital environments.”¹² Douek identifies how constructive developments, such as transparency

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⁸ See infra notes 58–62 and accompanying text.

⁹ Stalemate in the United States is increasing the influence of regulators in other countries. See Tom Wheeler, The UK and EU Establish Positions as Regulatory First Movers While the US Watches, BROOKINGS INST.: TECHTANK (Mar. 8, 2023), https://www.brookings.edu/blog/techtank/2023/03/08/the-uk-and-eu-establish-positions-as-regulatory-first-movers-while-the-us-watches [https://perma.cc/7FMM-D3VD].


¹² Id. at 168, 198–201.
reporting, derive from self-regulatory efforts as platform companies seek more legitimacy and responsiveness to users. Her analysis also could prompt self-regulatory efforts to pursue systemic, proactive, and innovative approaches, including monitored self-regulation.

Yes, self-regulation is likely to advance the interests of the companies and benefit incumbents over new entrants, but it also can draw on the knowledge, resources, and flexibility of the private companies. Cautions about self-regulation, thus, should not weaken the pressure for action, even if the action takes the form of self-regulation. Self-regulation is far more likely to proceed and to identify effective strategies than are responses from the federal government. Calls for government regulation of social media are both understandable and a surprising point of convergence for people across the political spectrum, but they are unlikely to produce actual reforms anytime soon. A majority of Americans responding to surveys favor more attention by elected officials to policy concerns involving technology and tech companies, but Americans across political and racial groups also distrust Congress even more than they distrust the tech companies. Government regulation poses severe risks of suppressing speech of both individuals and platform companies as well as harming competition and innovation — even among social media companies that jeopardize the well-being of individuals and their trust in news and communications.

13 Douek, supra note 10, at 533–54; see also id. at 604–05.

14 See id. at 604–05; see also, e.g., id. at 602–03 (suggesting that private as well as public oversight can address approaching aggregated claims).

15 For concerns about protection of incumbents, see Kadri, supra note 11, at 195–96. On potential benefits from self-regulation, see infra pp. 433–42 (discussing concerns about self-regulation and potential benefits of it).


One study reports far more confidence in private, independent oversight than in regulation by government or by individual companies.18

A majority of Americans oppose changing existing law to allow individual suits against social media platforms for the content posted by third parties.19 The existing law, Section 230 of the Communications Decency Act of 1996,20 shields the platform companies from the kinds of defamation and fraud suits applicable to news media and publishers while also protecting the good faith moderation and removal of content they view as harmful.21 Intended to promote innovative internet companies, Section 230 has been interpreted to protect platforms from civil liability for leaving content up and also to protect them if they choose to take content down.22 Congress amended the law to permit liability related to content about sex trafficking — but rather than reducing sex trafficking, this change may have made it harder for law enforcement to track it and more difficult for sex workers to obtain information to enhance their safety.23 At the time of writing, the Supreme Court was considering two questions addressing the scope of the platforms’ continuing immunities: Does the immunity persist when a social media company employs recommendation algorithms to target users with certain content posted by third parties?24 And does a separate law — the Antiterrorism Act of 1990 — apply to a social media platform regularly detecting terrorist activity related to third-party content it hosts, or does the Section 230 immunity govern?25

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21 Id. § 230(c).


23 Id.

24 Sabine Neschke et al., Gonzalez v. Google: Implications for the Internet’s Future, BIPARTISAN POL’Y CTR. (Nov. 29, 2022), https://bipartisanpolicy.org/blog/gonzalez-v-google [https://perma.cc/5TUH-VqR] (describing Gonzalez v. Google LLC, 143 S. Ct. 2199 (2023) (per curiam), and Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023)).


26 Neschke et al., supra note 24.
Some want further congressional amendments to Section 230 to permit suits against the platform companies for hosting hateful and harassing speech, and misinformation related to COVID-19 and elections.27 But even before the midterm elections, action was stalled28 and advocates were pursuing changes to state laws.29 New laws in Florida and Texas would allow actions against media companies for the censorship of conservative content, but federal courts have at least temporarily halted implementation of both laws.30 Other proposed state laws would require social media companies to adopt methods for reporting hate speech or misinformation, to ensure transparency of moderation rules, and to protect children against social media addiction31 — though even when enacted, such reforms face court challenges from individuals and from the companies.

The companies seek not only freedom from regulation but also protection against divergent rules in different states.32 Because social media’s reach is global, though, the companies already face divergent rules across the globe. The companies, most of them based in the United States, must confront not only contrasting regulations in Europe, the United Kingdom, and Asia but also challenges in overseeing content in different languages and varied political contexts — and competition from companies outside the United States that may not even try to comply with rules here and elsewhere.

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Amidst these complexities and mounting unease about their industry, social media companies should engage in more vigorous self-regulation not only within their own firms but also through industry-wide


30 Id. After the District Court for the Western District of Texas enjoined the Texas law, the Court of Appeals for the Fifth Circuit stayed the district court’s injunction. The Supreme Court vacated that stay, but the Fifth Circuit subsequently upheld the Texas law. Then, on a motion by the trade group representing the technology industry, the Fifth Circuit stayed its own ruling pending Supreme Court review. See Rebecca Kern, 5th Circuit Blocks Texas Social Media Law as Parties Turn to SCOTUS, POLITICO (Oct. 12, 2022, 5:45 PM), https://www.politico.com/news/2022/10/12/5th-circuit-temporarily-blocks-texas-social-media-law-00061555 [https://perma.cc/R8L-qKsT].

31 Kern, supra note 29.

32 Id.
organizations. Private-sector collaborations can offer some protection against the biases and self-interest of individual companies (although large and established companies may band together for self-regulations that disadvantage smaller newcomers—and “regulatory capture” by dominant companies is a danger even with public regulation). Self-regulation by voluntary standards, adopted through industry-level private groups, has offered apparently effective responses in other economic sectors.

Through voluntary self-regulation, in contrast to “audited” self-regulation, private industry-level organizations create rules and standards with which individual industry actors voluntarily comply. Federal agencies may retain some involvement but typically delegate standard setting and licensing to self-regulatory bodies.

For example, the Financial Industry Regulatory Authority (FINRA) is a private, nongovernmental organization that licenses and audits securities dealers to promote transparency and compliance with ethical standards devised through its own rulemaking process. Its members—private organizations and professionals—use the self-regulatory approach to enhance integrity and build trust in the securities industry. The government, through the Securities and Exchange Commission (SEC), can review the disciplinary proceedings conducted by FINRA and also can propose changes in the rules. The self-regulatory process, thus, draws on the expertise of the industry, the industry’s own interest in earning and expanding trust of the public, and knowledge and concerns channeled through government. FINRA's

33 See Kadri, supra note 11, at 195–96.
35 “Audited” self-regulation is power delegated by government to private entities which are allowed to create and enforce rules; the government can review resulting actions and reports for accuracy. Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 ADMIN. L. REV. 171, 176 (1995). See generally Lisa L. Sharma et al., The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures, 100 AM. J. PUB. HEALTH 240 (2010) (examining various self-regulatory efforts).
37 About FINRA, FINRA, https://www.finra.org/about [https://perma.cc/7LU3-MRJC].

influence is substantial.\textsuperscript{40} Similar self-regulatory approaches oversee trading in derivatives through the National Futures Association, a national industry-wide effort to protect both investors and markets.\textsuperscript{41} Self-regulation may create barriers to entry for newcomers or otherwise advance companies’ self-interest, but it also harnesses insider knowledge and companies’ desires to be trusted by the public.

Third-party watchdog organizations help regulate industries by offering seals or certifications for meeting certain standards or by rating or accrediting actors in the industry.\textsuperscript{42} For example, the Good Housekeeping Institute evaluates products and issues a seal on those that perform as intended.\textsuperscript{43} The Institute provides refunds to consumers for any product with the seal that a consumer finds defective within two years of purchase.\textsuperscript{44} Similar approaches have also worked in a range of other industries. Independent private bodies provide accreditation that is central to hospitals as they participate in government funding programs.\textsuperscript{45} Audited self-regulation through local agricultural boards ensures stable markets for certain agricultural products, and industry private audits verify that fruits and vegetables are produced, packed, handled, and stored to minimize risks of microbial food safety hazards.\textsuperscript{46} For addressing environmental threats, the International Organization for Standardization plays a large role by developing international standards, which are used as benchmarks for external certification bodies that certify industries that pose environmental threats.\textsuperscript{47} Production of certified products improves regulatory compliance and reduces pollution faster than noncertified production.\textsuperscript{48}


\textsuperscript{42} See Sharma et al., supra note 35, at 243–44.


\textsuperscript{44} Id.


\textsuperscript{47} See About Us, INT’L ORG. FOR STANDARDIZATION, https://www.iso.org/about-us.html [https://perma.cc/D4UJ-M7FE].

The Federal Trade Commission (FTC) actively encourages and assists private-sector self-regulation efforts. Trade institutes governing beer, spirits, and wine have adopted advertising and marketing codes to reduce marketing that would increase underage audiences. Alcohol producers in the United States have also signed on to marketing principles established by the International Center for Alcohol Policies. And some alcohol producers have created their own internal advertising codes. The FTC consulted with the Individual Reference Services Group, a trade association establishing and monitoring compliance with standards to protect data aggregated across internet and private

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50 FED. TRADE COMM’N, SELF-REGULATION IN THE ALCOHOL INDUSTRY 1 (2014).


databases.53 These kinds of self-regulation yield impressive compliance rates54 and address issues not handled by the federal regulatory body.55

The motion picture industry, electronic game industry, and music recording industry each have self-regulatory systems for rating or labeling their products with the familiar notations for movies of G, PG, PG-13, and R; the label of “Mature” rating for games; and the label of “Explicit” for music.56 The FTC’s regular reports on the self-regulatory practices of these entertainment industries find substantial compliance with the voluntary standards by the motion picture and game industries and less, but still meaningful, compliance by the music industry.57

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What now are lessons from the experiences of self-regulation with broadcasting? Self-regulation efforts should be carefully crafted to comport with antitrust law — or devised in concert with exemptions to antitrust rules.

The history of the NAB is instructive. Starting in 1952, the NAB devised and revised code of conduct rules for programming and advertising, including content standards and advertising time limits.58 The NAB created and enforced these standards in large part to ensure member compliance with the Federal Communication Commission’s requirement that licensees operate in “the public interest.”59 Yet, in 1970, the Department of Justice filed an antitrust suit against the NAB, alleging that portions of the code of conduct “restricted the available amount of

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53 See Valentine, supra note 49.
57 Id. at 15.
59 Id. at 888, 890.
commercial time" and therefore restrained competition in violation of the Sherman Act. In the agreement settling the suit, the NAB agreed to rescind its code. This experience chilled self-regulatory efforts by broadcasters, and led to some broadcasting of ads that the earlier codes would have rejected.

Self-regulatory approaches have in other settings successfully overcome inadequate information, offered flexible adaptations to changing circumstances, limited costs borne both by industries and governments, engendered a sense of responsibility in private actors, and navigated requirements of antitrust laws.

Voluntary sector-wide self-regulation is especially effective, according to researchers, when there is activist engagement with the industry, an independent monitoring structure, continuing possibilities of enforcement actions outside of the self-regulatory body, pressure from customers and civil society groups, threat of private lawsuits, some vertical integration within companies, and a strong trade association. Social media as a sector holds promise for efficacious sector-wide self-regulation. Again, public approval of private independent regulation contrasts sharply with public distrust of government regulation and of individual-company regulation when compared with the prospect of no government regulation.

Strikingly, the European Union has constructed a voluntary code regarding disinformation and a variety of stakeholders — including Microsoft, Google, Twitter, and other companies founded in the United States — have signed on to the code.

60 Id. at 890.
61 Id. at 891.
66 Sharma et al., supra note 35, at 243.
68 See supra note 17 and accompanying text.
The Netherlands employs a hybrid of private and public regulation: sectoral industry organizations can submit codes of conduct to a government supervisory body for approval.\textsuperscript{70} The Netherlands assigned power to sectoral industry organizations to enact legally binding data protection regulations responsive to questions identified by the government. If the government found self-regulation insufficient in a given sector, the government could decree sectoral privacy regulations.\textsuperscript{71} For at least the first nine years of this plan, the government found the codes of conduct sufficient and did not decree other sectoral privacy regulations.\textsuperscript{72} (But Dutch courts remain able to interpret the Data Protection Act\textsuperscript{73} for themselves and can find a firm in violation of the statute even if it’s acting in compliance with the accepted code of conduct.\textsuperscript{74})

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How could self-regulation proceed with social media? Current and former social media executives warn that their industry harms civil discourse essential to democracy and amplifies misinformation, social divisions, and risks of violence.\textsuperscript{75} The status quo seems unsustainable.\textsuperscript{76} Of course, social media platforms and the larger group of digital platform companies are diverse in emphasis, business models, scale, and values.\textsuperscript{77} Some provide social networking and amplify peer-to-peer communication with algorithmic priority ranking of items and individualized

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\textsuperscript{71} Kuitenbrouwer, supra note 70, at 110.

\textsuperscript{72} See id.

\textsuperscript{73} Wet van 28 december 1988, houdende regels ter bescherming van de persoonlijke levenssfeer in verband met persoonsregistraties (Wet persoonsregistraties), Stb. 1988, 665.

\textsuperscript{74} Kuitenbrouwer, supra note 70, at 112.


targeting of ads.\textsuperscript{78} Others are primarily associated with searching information (Google) or sharing videos (TikTok) and photographs (Instagram). Still others — like those in the gaming industry — have social media and data collection practices.\textsuperscript{79} Internet commerce platforms, such as Amazon, provide a meeting ground for sellers and buyers of goods and services using a recommendation algorithm — all while selling their own data storage and tech services.\textsuperscript{80} Even with this variety, these companies receive and deploy large quantities of information from individuals and groups, use algorithms to create recommendations, sell and display ads to individuals based on analyses of the data they have shared, and afford varied channels for communication between individuals and groups.\textsuperscript{81} And the lines between the different fields blur as they acquire businesses (Google owns YouTube\textsuperscript{82}) and experiment with new lines of business.

Unlike concerns raised with other industries, the issues raised by digital platform companies can challenge the viability of democracies, spread risks of physical violence, and put into jeopardy individuals’ mental health even as they offer opportunities to learn, earn a living, and communicate.\textsuperscript{83} Digital platform companies offer avenues for freedoms of speech,\textsuperscript{84} access to knowledge, and chances — even for people with very limited resources — to sell their services and goods.\textsuperscript{85} The scale of these companies can be staggering because they reach people around the globe and enable millions of newly posted content items to circulate each hour.\textsuperscript{86} Devising and enforcing any common regulations is a potentially impossible task for governments. The particular tasks of moderating and regulating content shareable on social media raise not only fraught dangers from suppressing speech but also potentially

\textsuperscript{78} See Arvind Narayanan, Understanding Social Media Recommendation Algorithms, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Mar. 9, 2023), https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms [https://perma.cc/2UHW-WZDS].


\textsuperscript{81} See Narayanan, supra note 78.

\textsuperscript{82} Matthew Johnston, 7 Companies Owned by Google (Alphabet), INVESTOPEDIA (Oct. 23, 2022), https://www.investopedia.com/investing/companies-owned-by-google [https://perma.cc/NE8M-GQWL].

\textsuperscript{83} See Vincent, supra note 75.

\textsuperscript{84} Cf. Simpson & Conner, supra note 34.

\textsuperscript{85} Cf. What Is Ecommerce? Launch and Grow an Online Sales Channel, supra note 80 (describing ecommerce platforms that would allow those with limited resources to sell services and goods).

\textsuperscript{86} On Facebook alone, “[e]very 60 seconds, 510,000 comments are posted, 293,000 statuses are updated, 4 million posts are liked, and 136,000 photos are uploaded.” Maddy Osman, Wild and Interesting Facebook Statistics and Facts (2023), KINSTA BLOG (Dec. 6, 2022), https://kinsta.com/blog/facebook-statistics [https://perma.cc/S8HS-XNNC].
unpredictable effects. 87 Hence, formulating and enforcing norms are
difficult challenges which call for iterative and evolving undertakings
by many different actors. 88

Focal points for any self-regulatory effort will vary because the busi-
nesses vary. But data privacy issues cut across all these companies and
devising some coordinated voluntary practices could seem more efficient
and coherent than addressing competing rules from the European
Union, China, individual states within the United States, and other
jurisdictions. Furthermore, the relevant governments might welcome
some forms of third-party auditing and other self-regulatory modes
given the scale and cost of oversight and enforcement of their rules such
as the European Union’s General Data Protection Regulation 89 and
Digital Services Act. 90 Collaborations with private industry and gov-
ernment could address workable definitions of unacceptable harassment
and strategies to monitor fake social media profiles.

Similarly, protections for children — including their data privacy,
guards against targeted advertising, and moderation of content inappro-
priate for young people — could be a focal point for sector-level self-
regulation. Such efforts could bring more fine-grained tools and nimble
approaches to areas that are already subject to some governmental reg-
ulation and enforcement. 91 Privacy professionals identify data protec-
tion for children as a global priority that should be taken up by both
governments and private-sector actors and seek to bolster laws in other
countries and the self-regulatory approach in the United States. 92 The

88 See Douek, supra note 10, at 533.
European Union has already directed social media firms to track down and remove content connected with child abuse.93

In the specific context of social media content moderation, social media companies might even collaborate on categories in which to allow outside auditing. Industry groups could collaborate in defining best practices in areas of likely consensus, such as protecting children from violence and preventing extreme harassment.94 They could work to refine the transparency needed for effective fact-checking by third parties, fund and craft crowdsourced verification of accuracy, or work on defining misinformation.95 Self-regulatory efforts would draw on industry knowledge and hold off governmental pressures or provide a road-map for sensible governmental involvement.96 Financial and competitive pressures — and potential exemption from antitrust enforcement threats — could induce industry collaboration.

Meta’s creation of the Facebook Oversight Board seemed to some a publicity stunt; the company created this board as an external body composed of twenty journalists, academics, and politicians, to which people can appeal content enforcement decisions.97 It has rightly prompted serious criticisms.98 Yet now, after two years of its work, both the energy behind it and the critiques it has elicited could provide helpful predicates for more effective self-regulation. The initial remit of the Board was limited essentially to individual objections to removal of individual content.99 But by mobilizing — and compensating — distinguished people outside the company to oversee disputes over moderation decisions, the Oversight Board harnessed talented, independent

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94 For examples of collaborations already underway, see DOUEK, CONTENT CARTELS, supra note 77, at 7–8.


96 Self-regulation would also avoid government action in content moderation, and hence potential First Amendment violations. A private social media company could decide, for example, to take down or slow the spread of information about how to steal a car while governmental restrictions on such content would face constitutional challenge. See Tim Arango & Jacey Fortin, Teens Are Stealing More Cars. They Learn How on Social Media, N.Y. TIMES (Mar. 16, 2023), https://www.nytimes.com/2023/03/10/us/car-thefts-kia-challenge-tiktok.html [https://perma.cc/3ZDHI-FPEX].

97 Hannah Murphy, Facebook’s Oversight Board: An Imperfect Solution to a Complex Problem, FIN. TIMES (May 16, 2021), https://on.ft.com/3ePUsFS [https://perma.cc/TL75-LCWC].

98 See supra notes 11–12 and accompanying text.

individuals who care about their own reputations. The members of the Oversight Board are pressing for transparency of the social media entity’s rules and practices, exposing failures by the company to follow its own rules, and overcoming company resistance to welcoming and responding to concerns.100

Some critics of the Oversight Board have established an independent alternative effort for monitoring and critique.101 Other social media companies can invent alternative approaches. Multiple private efforts offer the public and governmental actors opportunities to learn. Governments intervene with private-sector enterprises when the private sector fails to address harms they produce. Even with federal action in the United States stalled, state governments have started to act — much like governments outside the United States.102 Ongoing calls for new responses offer some grounds for concerns that self-regulation will “lock in” oversight for social media.103 Even governments moving to regulate risks from social media companies find it essential to work with the private enterprises in order to identify and mitigate harms.104 As other social media platforms examine self-regulatory options, collaborations across the sector could bring the kinds of ongoing improvements that have occurred with hospital accreditations, liquor sales, environmental threats, and other sources of serious social risk.

100 Levy, supra note 99.


103 Kadri has expressed concern about consistency and uniformity in self-regulation choking off innovation and improvements. Kadri, supra note 11, at 197. The experiences of other industries described here suggests that self-regulation can generate competition and also offer models for ongoing government efforts.

104 Wheeler, supra note 9.