



# Regulatory Analysis and the Independent Agencies

---

J. Howard Beales III



# The Role of Economic Analysis

---

- At least as vital at the independent regulatory agencies as anywhere else.
- Formal Regulatory Impact Analysis requirements are a means to an end.



# Independent Agencies -- FTC

---

- Mostly case by case enforcement
- At its best as a common law agency evolving legal principles to address emerging problems
  - E.g., privacy, information security



# FTC Statutory Authority

---

- Unfair or deceptive acts or practices.
- Unfair:
  - Causes or is likely to cause substantial consumer injury
  - Without offsetting benefits to consumers or competition
  - That consumers cannot reasonably avoid.
- Basically a cost benefit test.



# FTC Statutory Authority

---

- Deceptive if:
  - Representation or omission is likely to mislead
  - Consumers acting reasonably in the circumstances
  - About a material issue (likely to affect choices).
- A subset of unfair practices with a streamlined test because it is rarely beneficial.



# Case by Case Enforcement

---

- Establishes clear legal rules over time.
- Economic analysis is vital, but little role for RIAs.
  - Also vital to developing effective enforcement strategies.
- Depends on agency appointees who are interested in the economic analysis.
  - Current problems in privacy, level of evidence required to support advertising claims.
- Principles developed through cases are important at other agencies as well.



# FTC Rulemaking Procedures

---

- More elaborate than typical APA rulemaking.
- ANPRM required
- Presiding Officer
- Initial comments, designated factual issues
- Opportunity for cross examination
- Rebuttal comments
- Staff Report, and separate Presiding Officer Report, and another opportunity for public comment
- Commission Decision



# FTC Rulemaking Results

---

- Slower and more deliberate process.
- In practice, only used where there is a reasonably strong consensus.
- Recent Business Opportunity Rulemaking





# Other FTC Rulemaking

---

- Some rules implementing specific statutes under APA procedures.
- E.g., Telemarketing Sales Rule, including the Do Not Call Registry.
- FTC asked for APA rulemaking in all rules, but Congress declined.



# Limits of a Formal RIA

---

- Consumer protection benefits frequently depend on behavioral responses for which there is little reliable data.
  - E.g., responses to disclosures of information.