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Rulemaking Authority of the US Federal Trade Commission

Daniel A. Crane (ed.)

Foreword by J. Howard Beales III and Timothy J. Muris

GO TO TABLE OF CONTENTS

Concurrences
Antitrust Publications & Events

Computer & Communications Industry Association
Tech Advocacy Since 1972

Rulemaking Authority of the US Federal Trade Commission

Foreword by J. Howard Beales III and Timothy J. Muris

Edited by

Daniel A. Crane

GO TO TABLE OF CONTENTS

Overview

GO TO TABLE OF CONTENTS

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Foreword

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After decades of relative stability, change has come to the Federal Trade Commission (FTC), and to the broader antitrust and consumer protection firmament. The Biden administration filled each of the major policy positions, including the heads of the Antitrust Division and FTC, with neo-Brandeisians, who reject the world they inherit, believing that the economy needs a major overhaul. Echoing their sentiments, President Biden decried the failed forty-year experiment in economics-driven antitrust that he and his appointees now clearly plan to end.[1]

This book analyzes one of the major initiatives to fulfill the renewed progressive vision, rulemaking at the FTC. Following the sentiments of the President's rejection of the last forty years, the new leaders often speak glowingly of policy before those failed decades, including FTC's use of rulemaking. A historical tour of the FTC's use of rules will thus help introduce this volume.[2] Besides academic research, we have extensive personal experience, both generally at the agency and specifically with FTC rulemaking, having each held four jobs at the Commission, most recently as chairman (Muris) and director of the Bureau of Consumer Protection (Beales) from 2001 to 2004. Regarding rulemaking, from 1974 to 1987, one or both of us worked extensively on FTC rules, covering

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1 Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy.

2 We tell the story in more detail in a recently released report for the American Enterprise Institute. *See* J. Howard Beales III & Timothy J. Muris, *Back to the Future: How Not to Write a Regulation*, American Enterprise Institute (June 2022).

GO TO TABLE OF CONTENTS

virtually every one of the major rules proposed then. In our most recent FTC tour, we led the agency when it enacted the rule that created the National Do Not Call Registry, one of the most popular consumer protection initiatives from any government agency. After that historical tour, we describe briefly the current FTC shift to rules, outline the book's chapters, and conclude with a cautionary tale of unintended consequences from a historic FTC rule.

I. Some FTC History

Rulemaking began, not at the agency's beginning in 1914, but in 1962, the agency having disclaimed any ability to issue substantive rules before then. New rules of practice, adopted in 1962 and effective the next year, provided for trade regulation rules that would resolve legal issues in subsequent enforcement proceedings. These were quite different rules than the modern rules that the FTC can write, in part because the agency's only authority to enforce them was to issue a cease and desist order, not obtain civil penalties.[3] Moreover, the 1962 rules envisioned that a respondent would have an opportunity in an enforcement proceeding to argue that the substantive rule should not apply to its particular circumstances.

Two years later, the Commission proposed one of the most significant rules in its history, requiring cigarette manufacturers to warn smokers of the health risks of their product.[4] For our current purposes, this important substance is not central; instead, it is the test for unfairness proposed in the Statement of Basis and Purpose (SBP) for that rule – a test significantly the brainchild of one who was to become a major figure in antitrust history, Richard Posner, then only twenty-five. Fresh from his stellar career at Harvard and having clerked for Justice William Brennan, Posner was an attorney advisor to Commissioner Philip Elman, an important figure in his own right for his role in the Cigarette Rule and, more notably in antitrust history, as one of the leaders in moving the FTC and the antitrust community from anticompetitive interpretations of the Robinson-Patman Act. The Cigarette Rule used a three-part test for an "unfair" act or practice: whether it "offends public policy," is "immoral, unethical, oppressive, or unscrupulous," or "causes substantial injury to consumers."[5]

Although the Commission continued to promulgate rules after 1964, it avoided using the Cigarette Rule unfairness test, perhaps because Congress had intervened, with its own, less restrictive cigarette warning.[6] On March 1, 1972, however,

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3 The FTC's authority to obtain civil penalties for rule violations is specifically limited to rules that define unfair or deceptive acts or practices. *See* 15 U.S.C. § 45(m)(1)(A).

4 Cigarette Rule SBP, 29 Fed. Reg. 8325 (July 2, 1964).

5 *Id*. at 8355.

6 *See* An Act to regulate the labeling of cigarettes, and for other purposes, Pub. L. No. 89-92, 79 Stat. 282 (1965).

GO TO TABLE OF CONTENTS

the Supreme Court decided the *Sperry & Hutchinson* (*S&H*) case.[7] Originally, the Commission had argued that S&H's restrictions on swapping its trading stamps were unfair methods of competition (UMC). On appeal, however, it advanced the new argument that S&H had committed unfair acts or practices.[8] Because this theory had not been litigated below, the Supreme Court remanded the case to the Commission. The opinion stated, in a passage that we were to read dozens of times in internal staff memoranda during the 1970s, that the FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond those enshrined in the letter or encompassed in the spirit of the antitrust laws."[9] The sentence ended with a footnote that, in dicta, appeared to bless the unfairness analysis advanced in the Cigarette Rule.[10]

S&H inspired an effort to explore the outer limits of unfairness, particularly for use in rules. The then newly created Bureau of Consumer Protection devoted considerable resources and intellectual firepower to the effort, establishing a special unit to develop rule proposals.[11] While the staff was hard at work to implement an expanded vision of unfairness, they received renewed support from the September 1972 oral argument testing whether the FTC's Octane Rule, discussed below, would be sustained. With the panel containing two of the liberal giants of the D.C. Circuit, David Bazelon and J. Skelly Wright, Commission attorneys were confident of their prospects for success. Indeed, the opinion, issued in June 1973, blessed agency rulemaking authority, with the important inclusion of the "safety valve," based on the agency's 1962 rules, allowing any respondent an opportunity to argue in an enforcement proceeding that the rule should not apply to their particular circumstances.[12]

Concerned over the FTC's growing use of rules rather than cases, Congress acted to codify procedures for FTC rulemaking. Paramount among congressional concerns was the vagueness of the FTC's substantive statutory offenses, especially unfairness. To help ensure discretion was exercised wisely, rather than seeking substantive definitions, Congress adopted procedural constraints that require hybrid rulemaking between Administrative Procedure Act informal notice-and-comment rulemaking and the formal procedures of administrative litigation.

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7 FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

8 As passed in 1914, the FTC Act proscribed "unfair methods of competition." In 1938, Congress added "unfair or deceptive acts or practices."

9 *S&H*, 405 U.S. at 244.

10 The footnote stated that "The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair," and quoted the unfairness test from the Cigarette Rule SBP.

11 The efforts to think creatively spawned a running joke among the staff that lasted for decades about the "unfair distribution of wealth" rule. Perhaps such a rule will yet emerge.

12 Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 692 (D.C. Cir. 1973).

GO TO TABLE OF CONTENTS

Passed late in 1974 and effective January 4, 1975,[13] section 18 of the FTC Act provided the Commission authority to write rules that "define with specificity" unfair or deceptive acts or practices (UDAP). The law did not change the Commission's authority regarding UMC rules.[14]

An extraordinary outburst of rulemaking followed. In a twelve-month period, beginning in April 1975, the Commission proposed sixteen transformative rules, touching myriad aspects of everyday life, including vocational schools, food and drug advertising, used cars, clothing care labels, hearing aids, funerals, mobile homes, and health spas, among others.[15] Not without cause was the Commission accused of seeking the mantle of the second most powerful legislature in Washington.

As we describe in detail elsewhere,[16] the rulemaking effort came undone, mostly of self-inflicted wounds, with the 1978 proposal to prohibit advertising to children prompting special hostility.[17] It signaled to many in Congress, the business community, and the media that the Commission was pursuing a personal vision, not addressing actual consumer harm. The *Washington Post*, no bastion of conservatism, editorialized that the FTC was becoming the "National Nanny."[18] Congress denied funding, closing the agency briefly – long before shutdowns became a recurring Washington phenomenon.

As multiple studies of 1970s FTC rulemaking documented, including one from the Administrative Conference of the United States, among the many failures, three stood out: (i) the lack of clear theories of illegality, (ii) substantive theories of why the practices were occurring and how to fix them, and (iii) systematic evidence to evaluate the extent of the problem and the efficacy of the remedies. Few of the proposals became final, and then usually after significant changes from the original.

Although the initial wave of proposals relied on defining UDAP, some had a competition rationale. The Eyeglass and Prescription Drug Rules, which would have preempted state bans on advertising, were based on the anticompetitive effects of such bans, for example.[19] The rationale for the surviving portion of the Eyeglass

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13 Pub. L. No. 93-637, 88 Stat. 2183 (1975).

14 15 U.S.C. § 57a(a)(2).

15 *See* Admin. Conference of the U.S., Recommendation No. 79-1–Hybrid Rulemaking Procedures of the Federal Trade Commission (June 1979), https://www.acus.gov/recommendation/hybrid-rulemaking-procedures-federal-trade-commission, for a table listing the twenty rules proposed before 1979.

16 *See* Beales & Muris, *supra* note 2.

17 Although the FTC proponents thought they could achieve large reductions in the amount of advertising children saw by banning advertisements where children were a majority of the audience, in fact, that would have affected only one program – *Captain Kangaroo*, the cherished adult friend to millions of children who grew up before Mr. Rogers entered the neighborhood. Even had the Captain survived without advertising, the impact on the amount of advertising seen by children would have been trivial. Most of the advertising that children saw was in popular adults or family sitcoms, such as *Laverne & Shirley* or *Happy Days*, or reruns of older sitcoms such as *I Love Lucy* in the after-school hours on local television.

18 Editorial, *The FTC as National Nanny*, Wash. Post, Mar. 1, 1978.

19 The proposals to preempt state advertising bans were mooted when the Supreme Court extended First Amendment protection to commercial speech. *See* Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

GO TO TABLE OF CONTENTS

Rule, requiring that the patient receive a copy of any prescription the doctor writes, is to encourage competition among eyewear and related providers. The Over-the-Counter Drug Rule, which would have required drug advertising to use precisely, and only, the words used to describe indications for use in Food and Drug Administration (FDA) regulations, addressed concerns that multiple terms for drug indications facilitated "spurious" product differentiation.[20]

Despite the fact that some rules were clearly aimed at competition problems, FTC antitrust attorneys did not want to join the rulemaking endeavor. They were preoccupied with their own effort to remake the American economy through a series of deconcentration cases and investigations, including litigation both to dismember vertical integration in the oil industry and to condemn the cereal industry for a shared monopoly (spurious product differentiation again!) as well as an extensive investigation to determine whether the auto industry should be dismembered.

In 1980, Congress stopped some specific rules and tightened section 18 procedures modestly. The Reagan administration arrived in October 1981 and disfavored rulemaking, as the new appointees proposed to move from unproductive and resource-intensive rules to cases. In consumer protection, the Reagan appointees created the program attacking fraud, which became a mainstay of FTC consumer protection, with the agency helping to coordinate a worldwide attack on the myriad aspects of fraud. In antitrust, they emphasized cases involving professions, trade associations, and restraints that misuse the government to stifle competition, as well as helping to develop the modern procedures for merger enforcement under the Hart-Scott-Rodino Act.

The problems caused by the FTC's aggressive use of its unfairness jurisdiction, primarily in section 18 rules, lead the agency to issue a letter in 1980 abandoning one of the prongs of the Cigarette Rule statement, regarding practices that were immoral, unscrupulous, or unethical, and relying principally on consumer injury to define unfairness. Nevertheless, the letter left independent use of public policy as a possible basis to find unfairness, an approach that the Commission abandoned in a 1982 codical to the 1980 letter. (The Reagan administration supported codification of the standard to limit the FTC's discretion.) The lack of agreement about an appropriate definition of unfairness delayed FTC reauthorization until 1994 when Congress finally enacted the current definition, in FTC Act section 45(n), combining both the 1980 and 1982 letters: A practice is only unfair if it causes or is likely to cause substantial consumer injury, without offsetting benefits to consumers or competition, that the consumer cannot reasonably avoid. Public policy can provide evidence to support the Commission's conclusions, but cannot serve as the sole basis for finding a practice unfair.[21]

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20 The one rule that also included an explicit unfair methods theory involved standards and certification, discussed below.

21 We discuss the public policy and other issues of the unfairness debate in J. Howard Beales III & Timothy J. Muris, The Limits of Unfairness Under the Federal Trade Commission Act (Association of National Advertisers 1991).

GO TO TABLE OF CONTENTS

One final piece of history relevant for today's debate was an effort in the late 1970s to use unfairness in competition cases, independent of the Sherman Act. The Commission lost all three cases litigated, in two different circuit courts.[22] In the intervening decades, only invitations to collude, beyond those that would give rise to attempted monopolization, have been the one area for use of so-called pure section 5, although the theory has yet to be tested in court.

II. Reliving History

Today's neo-Brandeisians seek to reverse the 1981 Reagan turn, shifting back from cases to rules. Unlike the 1970s, they propose to use rules under both UMC and UDAP. New Chair Lina Khan, writing with Rohit Chopra in 2020,[23] proposed UMC rulemaking, and it is uncertain whether the new FTC leadership will also use section 18 rulemaking to address competition issues. The *S&H* case, the use of section 18 rulemaking in the 1970s involving competition problems, and the increased emphasis in antitrust on consumer welfare since the 1970s all support an argument that no bright line necessarily exists between the "u" in unfair methods and that in unfair acts or practices. Moreover, section 18 rules have civil penalties and avoid the safety valve that is contained under existing precedent and FTC procedure. Most important, as discussed shortly, there are serious doubts that modern courts would sustain the D.C. Circuit's 1973 view that the FTC has the authority to issue UMC rules with the force of law.

Nevertheless, multiple reasons may move the current FTC towards UMC rules. Practically, they may fear section 45(n) because the statute reads in the consumer welfare language that they abhor – one of the principal causes they see of the alleged forty years of failure.[24] Substantively, although some of their proposals could be considered antitrust or consumer protection, others, perhaps aimed at redrafting Sherman Act principles, could not.[25] Section 45(n) does not apply to UMC, and, perhaps the

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22 E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980).

23 Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020). Chopra, then an FTC commissioner, is now director of the Consumer Financial Protection Bureau.

24 President Biden blamed the problem on Robert Bork and Chicago, ignoring the contributions of numerous other scholars, including those affiliated with Harvard, such as Phillip Areeda and Justice Stephen Breyer. *See* Biden Remarks, *supra* note 1. *See, e.g.*, William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1 (2007). For extensive discussions, *see* Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. Chi. L. Rev. 495 (2020); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 Antitrust L.J. 147 (2012).

25 Even if there is no general bright line between some practices for UMC and UDAP, they are two distinct statutory standards, arguably leaving some domain of unique cases for each. (The precise relation between the two standards is beyond our brief discussion here.) Agency use of UMC rules to apply different standards under section 5, then under the Sherman or Clayton Acts, for example to implement Chair Khan's desire to remove the recoupment requirement for predatory pricing (thereby chilling aggressive price-cutting) or to make mergers easier to challenge, would invite the conclusion that such rules were antitrust, not consumer protection or some hybrid. Section 18 could not be used for such rules.

GO TO TABLE OF CONTENTS

new leadership is willing to take its chances with "pure" section 5 theories hoping for potential judicial deference to the FTC's interpretation of its organic statute.

III. The Book's Contents

This book's important set of essays addresses the myriad issues that the return to FTC rulemaking raise. Several chapters focus on UMC rules, both whether the FTC has this authority, and, if it does, whether and how that authority should be exercised. Questions include: In the fifty years since the D.C. Circuit endorsed FTC rulemaking, have courts changed their approach to the issue? What, if anything, can be read from the 1974 congressional authorization of only UDAP rules? How will the evolving Supreme Court limitations on regulatory agencies influence the FTC, a question that relates both to the agency's authority and how it uses that authority? Assuming the authority exists, how will "pure" section 5 coexist with the Sherman Act? What is the appropriate balance between substantive rules and traditional case-by-case adjudication in setting competition policy?

Arguing for FTC's boldness, Lao[26] emphasizes judicial precedent for the FTC to act beyond the Sherman and Clayton Acts, and believes that FTC rulemaking authority should survive even under modern judicial standards for supervising regulatory agencies. She finds it important that the FTC lead in setting substantive antitrust standards that would necessarily differ, at times, from the other laws. Specifically addressing the D.C. Circuit's 1973 opinion and its context, Ohlhausen and Rossen[27] argue that UMC rules are essentially a dead end. Not only finding that opinion inconsistent with modern standards of interpretation, they also reject arguments that Congress in 1974 ratified UMC rulemaking and, indeed, when it gave the FTC authority for the Octane Rule under a different statute in 1977, it did so only under UDAP, not UMC. Szóka and Barthold[28] also cast serious doubts on expanded FTC rulemaking powers, focusing in depth on what they believe was the well-reasoned district court opinion that the D.C. Circuit overturned in 1973 and the arguments in favor of the district court's position. Assuming that the agency has the power, Su[29] nevertheless opposes wide use of competition rulemaking. In support of adjudication over rulemaking, he emphasizes the practical difficulties of competition rulemaking, including developing a factual record encompassing an entire industry, protecting the due process rights of those charged with violations, and the necessity for coordination with the Department of Justice's Antitrust Division.

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26 *See infra* Marina Lao, *Competition Rulemaking: The Case for Boldness*, pp. 1–29.

27 *See infra* Maureen K. Ohlhausen & Ben Rossen, *Dead-End Road:* National Petroleum Refiners Association *and FTC "Unfair Methods of Competition" Rulemaking*, pp. 31–48.

28 *See infra* Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature*, pp. 49–76.

29 *See infra* Henry Su, *Policing Anticompetitive Practices and Protecting the Competitive Process through Adjudication vs. Rulemaking*, pp. 77–100.

GO TO TABLE OF CONTENTS

Other chapters are also critical of broad UMC rulemaking power. Pierce[30] joins those who believe that the 1973 D.C. Circuit opinion used statutory interpretation inconsistent with modern courts. As do other authors, he notes that were courts to allow UMC rules, they would likely use the developing major questions doctrine to prevent any FTC attempts to use rules to change antitrust law significantly. (He does believe that if, contrary to his arguments that the FTC lacks UMC rulemaking power, a court could well approve a rule consistent with the evidence and current antitrust interpretation.) Abbott[31] also doubts that the FTC's rulemaking effort will succeed legally, emphasizing the constitutional delegation doctrine, principles of statutory construction, and the general judicial trend toward reigning in administrative agencies. Finally, on the UMC rule issue, Ohlhausen and Rill[32] join in emphasizing the lack of statutory authority for such rules, and the problem that the rules will distract from the FTC's core mission of case-by-case expert adjudication.

Barnett[33] considers antitrust rulemaking through the lens of the principal-agent problem. He sees recent FTC policy shifts, in particular, the revocation of policy statements without any replacement, as attempts to expand agency discretion, an expansion likely to increase agency costs. He sees a significant risk that the agency is headed toward a repeat of the disastrous 1970s.

Several chapters consider the choice between writing rules and case-by-case enforcement from different perspectives. Chilson[34] places particular emphasis on keeping regulatory requirements in pace with rapid changes in technology. He argues that case-by-case enforcement creates fewer problems in fast-moving areas, and that the FTC should therefore embrace it. Cooper[35] notes the flexibility of the enforcement approach, and its ability to account for all relevant facts and circumstances surrounding a particular alleged violation. He also examines the need for section 18 rules to define unfair acts or practices "with specificity."

Nielsen[36] evaluates the consequences for the Commission if it does become a rulemaking agency. He points to three: (i) more White House oversight, increased judicial review, and ossification because of the difficulty of changing rules; (ii) more potential for policy flip-flops when administrations change (as with net neutrality); and (iii) more frequently becoming the victim of "administrative law as blood sport," with, for example, nominations held hostage over policy disputes.

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30 *See infra* Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, pp. 101–128.

31 *See infra* Alden F. Abbott, *Legal Constraints on FTC Competition Rulemaking*, pp. 129–154.

32 *See infra* Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, pp. 155–176.

33 *See infra* Jonathan M. Barnett, *Regulatory Rents: An Agency-Cost Analysis of the FTC Rulemaking Initiative*, pp. 177–200.

34 *See infra* Neil Chilson, *Case-by-Case Rules! Old Statutes and New Tech at the FTC*, pp. 201–224.

35 *See infra* James C. Cooper, *Privacy Rulemaking at the FTC*, pp. 225–254.

36 *See infra* Aaron L. Nielsen, *What Happens if the FTC Becomes a Serious Rulemaker?*, pp. 255–270.

GO TO TABLE OF CONTENTS

Finally, as Crane[37] notes, the FTC's independence is under threat, both from the executive branch, with an executive order urging the Commission to address certain competition concerns of the administration, and from the judiciary, via decisions such as *Seila Law*[38] holding that executive branch officials must be subject to presidential removal at will. Because the FTC's current operations differ substantially from the characterization in *Humphrey's Executor*,[39] independence is at significant risk even if the Court follows that long-ago decision.

IV. The Pitfalls of Rulemaking: A Cautionary Tale of Unintended Consequences From the Historic FTC Octane Rule

We end with a reminder of the fallibility of rulemakers, discussing the rule on whose judicial blessing today's FTC relies for UMC rules. The Octane Rule itself illustrates the potential perils of rulemaking, and the risk of unintended side effects. As described in the rulemaking record, there were three measures of octane in use at the time: the research method, the road test method, and the motor method. For a given gasoline, research method octane numbers were generally eight to nine points higher than the motor method result, with the road test in between.

As originally promulgated in December 1970, the Commission declared it an unfair practice and an unfair method of competition to fail to disclose the research octane number. Before the rule took effect, however, Texaco provided evidence of an octane reversal problem: consumers who were dissatisfied with the anti-knock properties of their gasoline might, if they switched to a higher research octane gasoline, purchase a product with less road octane capability, rather than more. The Commission suspended the rule's effective date and reopened the record to reconsider the appropriate disclosure. The result was a decision to require retailers to post the average of the two most common measures: the research method, plus the motor method, divided by 2, or (R + M)/2. This requirement was promulgated in December 1971.[40]

The Commission never explained how this in fact solved the octane reversal problem. A gasoline with a higher research octane would also have a higher (R + M)/2, but could still have inferior road octane performance. But the "compromise" – if that was what the agency was attempting – created a different problem. At the time, owner's manuals frequently recommended octane requirements based on the research octane method. Most 1971–1974 model cars could

37 *See infra* Daniel A. Crane, *FTC Independence after* Seila Law, pp. 271–297.

38 Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ___, 140 S. Ct. 2183 (2020).

39 Humphrey's Executor v. United States, 295 U.S. 602 (1935).

40 36 Fed. Reg. 23,871 (Dec. 16, 1971).

GO TO TABLE OF CONTENTS

use regular gas, with a research octane number of 91.[41] But with a motor octane number generally eight points lower, the new disclosure would identify the gasoline's octane rating as 87 – familiar today as the octane number for regular gas. The owner's manual, however, recommending 91 octane gas using a different scale,[42] could induce consumers to pay more for premium gasoline, even when their car did not need it. Consumer advocates estimated that consumers who purchased gasoline based on the car manufacturer's recommendations could pay an extra $35 per year[43] – or over $175 per year, in current dollars. In the name of helping consumers avoid needless expenditures for more octane than they needed, the rule created an incentive for those consumers who paid attention to buy more octane unnecessarily!

Of course, this is a transition problem – eventually, auto manufacturers would adjust their fuel recommendations to the new measurement system. But the extra consumer costs that result from the transition problem could easily overwhelm the presumed benefits of buying less octane that were thought to result from the required disclosure in the first place. The Commission never conducted sufficient analysis to determine whether consumers would actually save money, or, instead, spend more.

Perhaps ironically, the FTC's rule did not go into effect until it was repromulgated pursuant to the Petroleum Marketing Practices Act in 1978. Octane posting was instead required by the Cost of Living Council in 1973, and replaced by the same requirement from the Federal Energy Administration when the Council's authority expired in 1974.[44] Both agencies deferred to the presumed expertise of the FTC, requiring disclosure of (R + M)/2.

The current Commission seems determined to embark on a new rulemaking campaign. We hope it exercises more care than its progressive counterpart of the 1970s.

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41 John D. Morris, *Octane Ratings Can Be Confusing*, N.Y. Times (Sept. 9, 1973), https://www.nytimes.com/1973/09/09/archives/octane-ratings-can-be-confusing-more-accuracy-testing-is-urged.html.

42 *Consumer Fuel Disclosure Act of 1975: Hearing on S. 1508 Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong 1 (1975) (opening statement of Senator Hartke).

43 *Id.* at 42 (statement of Louis V. Lombardo, President, Public Interest Campaign).

44 Robert J. Gage, *The Discriminating Use of Information Disclosure Rules by the Federal Trade Commission*, 26 UCLA L. Rev. 1037, 1050 n. 36 (1979).

GO TO TABLE OF CONTENTS

Table of Contents

GO TO TABLE OF CONTENTS

Dead-End Road: *National Petroleum Refiners Association* and FTC "Unfair Methods of Competition" Rulemaking

Maureen K. Ohlhausen and Ben Rossen

The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature

Berin Szóka and Corbin Barthold

GO TO TABLE OF CONTENTS

GO TO TABLE OF CONTENTS

Pushing the Limits? A Primer on FTC Competition Rulemaking

Maureen K. Ohlhausen and James F. Rill

GO TO TABLE OF CONTENTS

Regulatory Rents: An Agency-Cost Analysis of the FTC Rulemaking Initiative

Jonathan M. Barnett

Case-by-Case Rules! Old Statutes and New Tech at the FTC

Neil Chilson

Privacy Rulemaking at the FTC

James C. Cooper

What Happens if the FTC Becomes a Serious Rulemaker?

Aaron L. Nielson

FTC Independence after Seila Law

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Rulemaking Authority of the US Federal Trade Commission

Daniel A. Crane (ed.)

Foreword by J. Howard Beales III and Timothy J. Muris

This book analyses one of the major initiatives proposed within the movement for competition reform, rulemaking at the US Federal Trade Commission (FTC). The collection of essays draws on the experience of lawyers and academics, including practitioners with backgrounds at the FTC, to address the myriad questions raised by the prospect of notice-and-comment rulemaking to make major changes in antitrust law. Several chapters focus on unfair methods of competition (UMC) rules, both whether the FTC has this authority, and, if it does, whether and how that authority should be exercised. Others consider the choice between writing rules and case-by-case enforcement from different perspectives, while others yet evaluate the consequences for the FTC if it does become a rulemaking agency. An essential read for all interested in the future of competition law, enforcement, and policy. Published in collaboration with the Computer Communications Industry Association (CCIA).

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