



The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets:

An Exercise in Political Economy

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Voluntary Information Submission

- Letters requesting access
- Surveys
- Questionnaires
- Interviews
- Problems with voluntary information:
biases, less than complete picture

Civil Investigative Demands (CIDs)

- CID provision grants authority to issue CIDs for
 - Documentary materials
 - Tangible things
 - Reports or Answers to Questions
- Constraints
 - Definiteness and certainty

Subpoenas

- Section 9: “the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.”
- Virtually no difference between CIDs and subpoenas, except CID recipients need only provide access to the documents.

Access Orders and Special Reports

- Access orders compel access to files
 - Reports require submission “to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing.”
 - Reports provide sworn responses
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Constraints on Authority

General Categories

- Statutory Limitations
- Internal Limitations
- Court Limitations
- External Limitations
- Industry Limitations

Paperwork Reduction Act

- Where PRA does apply Rube-Goldbergesque procedures follow
- 60 day process
- Applies to surveys, questionnaires, special reports directed at 10 or more persons
- Does *not* apply to subpoenas and CIDs
- Not likely to be a major constraint on information gathering given other means of obtaining information

Internal Limitations

- Discouragement of large scale investigations
 - “No large-scale or industry-wide investigation or study is to be undertaken, if numerous proposed respondents or substantial expenditure of Commission resources are involved, or if a significant change in the overall resource levels (work-years or dollars) of a Commission-approved program will result unless prior approval has been granted by the Commission. . . .If it is agreed that Commission approval is required, the proposal for the investigation should be submitted to the Commission by explanatory memorandum routed through the appropriate review and evaluation procedure.”
- Scarcity of Resources
- Fear of Political Recoil

Court Limitations

- Practically nonexistent
 - 4th Amendment challenges likely to fail
 - Challenges based upon statutory or judicially created immunities or exemptions also likely to fail
 - Challenge to the reasonableness and burdensomeness likely to fail as well
 - Failure to file reports backed with fines

External Limitations-Congress

- Statutory immunity
- Modification of FTC authority
- Purse
 - Microsoft and the DOJ
- Agency Capture
- But is Congress a real or perceived constraint?

Congressional Recoil From FTC Investigation?

- Congress does not always side with business
 - Recent directive to investigate gas manipulation
 - Targeted use of broad statutory authority not likely to cause recoil
 - Most challenges to authority result of FTC adjudication, not investigation
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More Reasons Not to Fear

- Statutory Immunities
 - Recent Consultant Report to the AMC on Statutory Immunities (Bush, Leonard, Ross)
- Agency not as likely to be subject to capture
 - Not single industry agency
- Past statutory curtailments of authority targeted at unfair or deceptive acts or practices
 - Statutory Immunities Report

Industry Idiosyncrasies

- Realtor political power
- Large volumes of transaction
- Largely “unsophisticated” consumers
- Geographically dispersed data
- Geographically islanded markets

More Industry Idiosyncrasies

“Most sellers prefer to work with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighborhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest. The geographic coverage of the MLS serving each town, city, or metropolitan area normally establishes the outermost boundaries of each relevant geographic market, although meaningful competition among brokers may occur in narrower local areas.”^[1]

^[1] U.S. v. National Association of Realtors, available at <http://www.usdoj.gov/atr/cases/f211700/211751.htm>.

In the Past...

- Strong Reports
- Residential Real Estate Brokerage Industry (1983).

Conclusion

- The FTC has a great deal of statutory authority to obtain broad amounts of data in sweeping investigations
- The FTC's investigatory authority has not been limited in any significant way, except perhaps by its own perceptions and policies