Safe at Any Speed: Robert Ahdieh's Take on Cost-Benefit Analysis in Financial Markets

Author : Jack Beermann

Date : November 26, 2014

Robert B. Ahdieh, Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s), 88 **N.Y.U.L. Rev**. 1983 (2013).

When I saw the title of Robert Ahdieh's recent article, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, I thought, "oh no, not another article about CBA." Knowing Professor Adhieh's work, I took a flyer and read it anyway, and boy was I happy with my decision. This is a great article which should be of interest to anyone involved in administrative law, securities regulation and policy analysis more generally. Cost-benefit analysis has become an important regulatory tool, and Professor Adhieh's article makes a valuable contribution to the literature on the special analysis required under Section 106 of the National Securities Market Improvement Act of 1996, 15 U.S.C. § 77b (2012) and to the literature on cost-benefit analysis more generally.

Ahdieh's jumping-off point, section 106 of the National Securities Market Improvement Act of 1996, requires the Securities and Exchange Commission (SEC) to consider, in all of its actions, including rulemaking, "in addition to the protection of investors, whether [an] action will promote efficiency, competition, and capital formation." As Ahdieh observes, on its face, this provision has little bite—it requires only consideration of the effect on markets and it does not impose any substantive standard such as the efficiency requirement imposed by Congress in other regulatory contexts. Despite the moderate nature of Congress's language, as Ahdieh reports, when the SEC promulgated a regulation expanding shareholder access to corporate proxies to nominate corporate directors, "[c]onsidering SEC rulemaking unsafe at any speed, . . . the Business Roundtable and the Chamber of Commerce challenged the new rule . . . invoking the language of Section 106 . . . [arguing] that the SEC's assessment of the costs and benefits of mandatory proxy access had not met the requirements of Section 106."

Surprisingly, in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), the DC Circuit agreed with the challengers' arguments, and in effect construed Section 106 as imposing a rigorous cost-benefit analysis requirement on the SEC. As Ahdieh notes, "most surprising was *Business Rountable*'s dramatic departure from the deference the courts had previously shown agency evaluations of costs and benefits."

So, what's so great about Ahdieh's article? Many things. I'll list a few of them. First, Ahdieh takes a fresh look at the development and application of cost-benefit analysis in American administrative law, with excellent analysis and biting critique along the way. Second, Ahdieh conducts an extended, in-depth analysis of the enactment, text, and application of Section 106. This is a first-rate case study of a regulatory statute, worthy of inclusion in a course on Legislation or Securities Regulation. Third, Ahdieh explores the values advanced by cost-benefit analysis including enhancing efficiency, reducing cognitive bias, forcing rational priority setting, reducing regulation, and increasing transparency through clearer analysis and enhanced monitoring of agencies. Fourth, Ahdieh explores different forms of cost-benefit type analysis based on the unique language of each regulatory statute imposing analytical requirements. He persuasively argues that Section 106 is best understood as imposing a purely procedural obligation, similar, I guess, to the National Environmental Policy Act's (NEPA) requirement

that agencies "consider" the environmental effects of their actions.

In my view, this discussion contains a devastating critique of the *Business Roundtable* decision which Ahdieh, in his typically modest and even-handed style, soft-peddles a bit too much for my tastes. Ahdieh's conclusion is that "[j]udicial review under Section 106 should be circumspect . . . and highly deferential. Such deference is consistent with the traditionally limited judicial constraints on the SEC . . . [and] is in line with the Commission's significant expertise and its stature as an independent agency." No kidding. This critique could be applied across a wide swath of the D.C. Circuit's administrative law decisions.

Ahdieh's article was a joy to read and contains lessons that transcend its context. Anyone interested in cost-benefit analysis, securities regulation, judicial review, statutory construction and the regulatory process will benefit from the time spent reading this article. It's the type of article that gives administrative law scholarship a good name.

Cite as: Jack Beermann, *Safe at Any Speed: Robert Ahdieh's Take on Cost-Benefit Analysis in Financial Markets*, JOTWELL (November 26, 2014) (reviewing Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 **N.Y.U.L. Rev**. 1983 (2013)), https://adlaw.jotwell.com/safe-at-any-speed-robert-ahdiehs-take-on-cost-benefit-analysis-in-financial-markets/.