Testimony of

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Before the

Subcommittee on Innovation, Data, and Commerce

Committee on Energy and Commerce

House of Representatives

On

Federal Trade Commission Practices: A Discussion on Past Versus Present

September 19, 2024

Chairs Rodgers and Billirakis, Ranking Members Pallone and Schakowsky, and Members of the Committee, thank you for the opportunity to testify today on the practices of the Federal Trade Commission. I am Howard Beales, emeritus professor of Strategic Management and Public Policy in the George Washington School of Business. I have published numerous academic articles on the FTC, and held a variety of different positions at the agency. Most recently, I was the Director of the Bureau of Consumer Protection from 2001 to 2004.

Former FTC Chairman Tim Muris and I recently wrote "Achieving Change at the Federal Trade Commission: Success and Failure," published in May by the Competitive Enterprise Institute. We analyzed three eras of dramatic policy change at the Commission, following the elections of 1968, 1980, and 2020, evaluating the first 34 months of each new Administration at the FTC. Our focus was the process of developing and implementing change, rather than the merits of the new leadership's substantive policies. My testimony today is largely based on this study, a copy of which is attached to my testimony. We also wrote an op ed for the *Wall Street Journal* based on the study.[1]

Prior Change Eras

In 1969, influential reports from "Nader's Raiders" and the American Bar Association condemned the FTC as ineffective and focused on trivia. When Casper Weinberger became Chair in 1970, he began the process of substantially reforming the agency through reorganization, a shift away from the trivial and anti-consumer cases that had been widely criticized, and implementing dramatic policy change. By 1972, the revitalized FTC appeared triumphant. The staff and the agenda had been remade, in an agency growing in power, prestige,

[1] J. Howard Beales III and Timothy J. Muris, "Lina Khan's Failed FTC Experiment," Wall Street Journal, May 6, 2024. Available at https://www.wsj.com/articles/lina-khans-failed-ftc-experiment-management-mergers-legal-strategy-161e6b9c.

and popularity. The Commission's major constituencies, Congress, the practicing bar, the press, and the academy, all applauded.

Yet, 1972 was a false spring. The intellectual foundations of the FTC's competition program, focused on attacking concentration, were beginning to crack, as was judicial support for the heart of FTC antitrust. Those cracks became chasms, but the FTC never adjusted. It went from winning nearly all of its antitrust cases before 1976 to losing almost two thirds of those filed later in the decade. In consumer protection, the Commission succumbed to the temptation to use unfairness to attempt to remake the American economy, fundamentally changing the agency's direction. The surge of proposals provoked a political backlash, which crested in 1978 when the Commission's proposal potentially to ban all advertising to young children led the *Washington Post* to mock the FTC as the "National Nanny." Congress briefly refused to fund the agency in May, 1980, and later that month bipartisan majorities enacted new restrictions on the FTC. The need for change was again clear.

A year later, the Reagan Administration's new Chairman, James Miller, implemented a major change in direction. In antitrust, task forces explored the legal and policy issues in government restraints on competition, bringing test cases that were ultimately successful. In consumer protection, a new Deception Policy Statement focused the agency's attention on marketing claims that were likely to mislead consumers, acting reasonably in the circumstances, about issues that mattered. An aggressive program to attack fraud became the centerpiece of the agency's consumer protection mission.[2] Two letters to Congress in 1980 and 1982 articulated

[2] Unfortunately, agency overreach led a unanimous Supreme Court to rule that the Commission lacked the authority for broad based monetary relief, a small part of which it had claimed as the foundation for the fraud program.

important limitations on the meaning of "unfairness" in the FTC Act's prohibition on "unfair or deceptive acts or practices," limits that Congress eventually codified in Section 45(n).

Nevertheless, after 34 months, the FTC of 1984 was closely divided, with considerable rancor between its Chairman and his immediate predecessor, who remained on the Commission. Outside attitudes were divided, politically and ideologically. But crucial foundations had been laid for what became a bipartisan consumer protection and competition policy lasting some 40 years. Fundamentally, this approach saw the FTC, not as the economy's star player, but as a referee to enforce basic rules to protect consumers in the marketplace. Subsequent administrations accepted the basic approach, and then built and developed it in important and sometimes different directions. Its global reputation as a premier antitrust and consumer protection regulator grew throughout these decades. Indeed, the FTC was the *only* agency ranked as a 5-star "elite" agency in every year from 2001 through 2020. This is the agency that Lina Khan inherited when she became Chair.

The Khan Administration

Breaking Norms

Beginning with the President naming a Chair who had been nominated only as a non-chair Commissioner, the current FTC has deviated from longstanding norms governing relationships within the Commission, with Congress, and with outside parties. Such norms are valuable lubricants, especially in institutions where individuals with strong, but different opinions, must work together.

The breaking of norms about the internal flow of information elevated the inevitable tensions with minority Commissioners to an unprecedented level of hostility. Although the Commission long valued open discussion between the career staff and the Commissioners at any decisional meeting, Chair Khan's first public meeting gave minority Commissioners limited time to consider important policy changes and excluded the career staff from participation. In other cases, explanations were offered only after the decision was made, without circulating drafts for comment, leading to clear errors on matters supposedly in the agency's expertise. Unable to obtain information internally, a minority Commissioner took the unprecedented step of asking businesses involved for the relevant information in two merger investigations.

Congress has also seen norms broken regarding information it requested from the Commission. At, best, the current Commission has been slow in producing requested documents, leading the House Judiciary Committee to schedule transcribed interviews with career staffers, and a heated letter exchange with the Committee Chairman. Unlike past requests, the Commission has asserted various privileges to withhold documents, including key documents necessary to question the agency on crucial representations to Congress. In the past, Congressional subpoenas to obtain information from the FTC have been exceedingly rare. They have proved necessary with the current Commission, however.

Routinely, the targets of proposed actions have been advised when the Commission receives a staff recommendation and allowed to meet with Commissioners. These meetings often help both sides, exposing potential weaknesses, increasing the likelihood of settlement, or enabling the Commission to clarify its complaint. They can also show that regulators take business concerns seriously, even if the agency ultimately disagrees. In at least two important matters, however, against Meta and Amazon, the Commission neither informed nor met with the companies.

One other norm that previously had been universally followed is also worth noting. In declining to recuse herself as a judge in the Meta-Within merger complaint, Chair Kahn became, to the knowledge of the Designated Agency Ethics Officer (DAEO), the *first* agency employee who participated in a specific party matter when the DAEO recommended recusal on appearance or other federal ethics grounds.

Managing the Career staff

Any new leader whose main objective is fundamental change will encounter resistance from some of the staff she inherits. Nevertheless, to achieve change, new leaders must rely on at least part of the existing staff, especially in the short run. The managerial challenge is how best to guide these essential individuals in a new direction. When Chair Khan arrived, the staff was proud of its role in an agency widely acclaimed, largely bipartisan, and consensus driven.

The new Chair immediately appointed three of Commissioner Rohit Chopra's attorney advisers as Chief of Staff and Acting Directors of the Bureaus of Competition and Consumer Protection, rather than relying on the individuals previously appointed by Acting Chair Slaughter. These moves sent a strong signal to the staff, because Commissioner Chopra's disdain for the career staff's role in what he saw as a failed agency was open and notorious. Elevating his attorney advisers was both unusual and seen as a sign that Chopra's views would control.

The new team's suspicion of the staff was apparent in their first week, when the staff was directed to cancel all public appearances, previously scheduled or not, even the most routine. Moreover, staffers were told to provide a misleading reason for the cancellation, "pressing matters at the FTC." In a public meeting roughly two weeks after Chair Khan's confirmation, the Commission made several important policy decisions but, in a highly unusual move, the format precluded career staff participation. A long tradition of frequent meetings between the Chair and the senior staff was suspended until late in 2021, and then replaced with less frequent meetings that were largely one way communications.

The staff reacted. In OPM's regular survey of agency employees, a majority (52%) strongly agreed in 2020 that "senior leaders maintain high standards of honesty and integrity." That number fell by almost half in 2021 (to 27%), and declined further in 2022. Similarly, almost half of employees (48%) in 2020 strongly agreed that they had "a high level of respect for my organization's senior leaders," a number that was cut in half in 2021 (to 23%) and also declined further in 2022. There was some rebound in 2023, but the results were only slightly better than 2021, and nowhere near the levels of 2020. Given the extent of staff turnover, one would have expected significantly more improvement. Staffers also voted with their feet. A quarter of those in leadership positions left in 2021, and departures among the senior line staff in 2021-22 were the highest in any two year period since 2000.

Although the Khan and Chopra view of the career staff implied that major changes were necessary, changes were not made. Previous change administrations adopted systematic strategies, including reorganization, to identify those staffers willing to help pursue the new agenda. Chair Khan instead relied on attrition, losing some of the best and most experienced managers, without any systematic attempt to identify those who were willing to work with the new leadership. Many career staffers, the overwhelming majority who almost certainly voted for President Biden, would likely have supported more aggressive policies, but the Biden team made clear their belief, like President Trump, that those careerists were a major source of the problem, not part of the solution. Unsurprisingly, the career staff reciprocated the hostility.

Rather than using reorganization and related steps to gain firm control of the key agency enforcement bureaus and launch a new era, the Khan administration turned to personnel outside of the agency's enforcement structure. Surprisingly, some were unpaid consultants hired without regard to the legal constraints on what consultants, as opposed to employees, may do. The

Chair's office and the Office of Policy Planning both expanded greatly, but neither were the direct and immediate supervisors of those actually doing the work.

Implementing a Strategy for Legal Change

There is little doubt that the Khan Administration seeks to change how courts think about antitrust law. Although the Neo-Brandeisian view of antitrust predates the Biden Administration, even a few years before the election it was outside the antitrust mainstream, and frequently derided as "hipster antitrust." With the new Chair at his side, President Biden proclaimed the last 40 years of antitrust, including 16 years of Democratic presidential leadership, an "experiment failed." Those policies, however, were widely endorsed across the political and academic spectrum, and the consumer welfare standard was thoroughly entrenched in the courts.

Changing the law requires a strategy to persuade the courts to change. For example, Thurgood Marshall and others famously implemented a well-considered, long-term strategy for civil rights litigation that led ultimately to the Supreme Court's decision in Brown vs. Board of Education. Beyond an initial hope for new legislation, there is no indication of a coherent FTC strategy for changing the law.

Unlike today's FTC, the Nixon and Reagan administrations at the FTC pursued legal change systematically. In the Nixon Administration, the FTC used the administrative process to develop the advertising substantiation doctrine, requiring advertisers to have a "reasonable basis" before claims are made. That doctrine remains a foundation of policing deceptive marketing. It also substantially reduced enforcement of the anti-consumer Robinson Patman Act that had been extensively criticized.

Following the model of the 1980 Unfairness Policy Statement Commission, the Reagan FTC adopted a well-reasoned Deception Policy Statement that proved influential in the courts and is another pillar of attacks on deceptive marketing. Both policy statements, by design, focused on the key issues and limited the Commission's discretion; both remail influential.

In contrast, the Biden Administration policy on unfair methods of competition maximizes discretion, amounting to a "we know it when we see it" standard. To the extent the statement includes any standards, it is the rhetorically appealing but substantively empty standards such as "oppressive" that the Commission abandoned long ago for unfair acts.[3] It is difficult to see that the new statement provides the authoritative and objective assessment of the law upon which courts might rely. Similarly, a group of 17 former chief economists at the FTC and the Department of Justice expressed the fear that the revised merger guidelines would "cease to remain a document that businesses and courts rely on."

Hospital mergers offer a good example of a systematic strategy for legal change. Early in this century the FTC changed a flawed judicial approach, beginning with empirical studies showing the adverse effects of approved mergers, and including public workshops and a joint report with the Department of Justice. An administrative test case was successful, and circuit courts eventually blessed the new approach, reversing a long string of court defeats.

Although it has not done so, the FTC is especially well positioned to address the empirical foundations of the progressive argument for a more restrictive merger policy, by studying a large sample of mergers to determine their effects. If the Biden antitrust agencies have the courage of their convictions, they should work with experts to develop such evidence,

[3] The FTC Act prohibits both "unfair methods of competition" and "unfair or deceptive acts or practices." As discussed below, Congress codified the elements of "unfair practices."

which provided the basis for changing hospital merger policy, as well as abandoning the much more aggressive merger policies of the 1960s and early 1970s.

If the Khan FTC has a strategy for influencing legal change, it is well hidden. Instead, it seems to be pursuing cases that are beyond the current boundaries of antitrust law, losing too many, and hoping that something will stick.

Rulemaking

Rules are a key feature of Chair Khan FTC's consumer protection agenda. As discussed above, aggressive industry-wide rulemaking was the Commission's undoing in the 1970s. Today's rulemaking proposals are in many cases even more ambitious, regulating not just individual industries but the entire economy.

At the start of Chair Khan's tenure, the Commission adopted substantial revisions in its rulemaking procedures. The changes were justified solely on the grounds of speeding the rulemaking process, without considering the actual problems that plagued earlier rulemakings, and without considering the impact of the procedures on the quality of the decisions that result. In our analysis of the changes, Professor Muris and I concluded that "the new procedures, inconsistent with statutory requirements, sound public policy, or both, will increase political control of rulemaking while decreasing public participation."[4]

When Congress granted the FTC rulemaking authority in 1974, it was concerned about the Commission's broad discretion in determining which practices were "unfair" or "deceptive."

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[4] J. Howard Beales III and Timothy J. Muris, "Back to the Future: How not to Write a Regulation," American Enterprise Institute, June, 2022, at 1 ("Back to the Future"). See also J. Howard Beales III and Timothy J. Muris, "Return of the National Nanny," Wall Street Journal, May 26, 2022. Available at https://www.wsj.com/articles/return-of-the-national-nanny-ftc-activists-rulemaking-regulation-banning-mandates-illegal-11653596958.

To ensure that discretion was used appropriately, Congress established special rulemaking procedures for the FTC. Congress sought to heighten the emphasis on reasoned decisionmaking in rulemaking, with procedures addressing directly the evidence bearing on whether to adopt a rule and requiring an explanation of the steps from data to the conclusion.[5]

Congress also sought to enhance public participation in the rulemaking process. Public comment is required, and comments must be available to all. The law creates a right to oral presentations, with cross examination as appropriate, and rebuttal comments if there are "disputed issues of material fact it is necessary to resolve"[6] -- the so-called designated issues. Thus, designated issues are an integral part of the rulemaking process, sharpening the focus of the parties, and the Commission, on the facts that matter.

One set of changes in the procedures adopted in 2021 diminishes the role of designated issues. The original rulemaking procedures provided for a rebuttal comment period after the initial round of public comments, during which parties could suggest designated issues. Determining which issues were in fact designated was generally left to the presiding officer. Under the new procedures, the Commission eliminated the rebuttal comment period, and provided that the Commission itself will identify designated issues. Parties can request hearings and suggest designated issues, but they must do so before they have the opportunity to review other comments.[7]

Shockingly, in two controversial rulemakings, proposing to regulate negative option offers and allegedly unfair or deceptive fees, the Commission proclaimed that there are *no*

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[5] Back to the Future at 9.

[6] 15 U.S.C 57a(c)(2)(B).

[7] See Back to the Future at 21-23.

"disputed issues of material fact it is necessary to resolve." The negative option proposal was the first rulemaking under the new procedures to be seriously contested, and the NPRM invited parties to "indicate" whether there were disputed issues. Although commenters suggested numerous issues, the Commission decided that there were none. It did so by applying a "summary judgment" standard that had never even been hinted at in the NPRM or in the Commission's own rules. It applied the same standard in the next rulemaking, again determining there were no disputed issues in the unfair or deceptive fees rulemaking.

There are at least two problems with this process. First, in the negative option rulemaking, the "summary judgment" standard was a complete surprise. Applying a new standard without any indication would seem to be the essence of arbitrary agency decisionmaking.[8]

More fundamentally, applying a summary judgment standard requires knowledge of the entire record. Parties in the unfair and deceptive fees rulemaking at least had the opportunity to craft their requests knowing that the Commission would apply the summary judgment standard. At the point at which they were required to propose an issue, however, *only the Commission* had access to the full rulemaking record. Indeed, the elimination of the rebuttal comment period institutionalizes this arrangement: in any rulemaking, the parties must suggest disputed issues without access to the entire record. This procedure is both arbitrary and inconsistent with the

[8] At the request of the parties, the presiding officer in the negative option rulemaking designated as a disputed issue the question of whether the rule had an overall impact greater than $100 million. The presiding officer concluded after the hearing that it did. She also designated the record keeping and disclosure costs of the rule as an issue and concluded that the record does not establish what those costs would be. See Recommended Decision, Negative Option Rule, April 12, 2024, available at https://www.iab.com/wp-content/uploads/2024/04/P064202-Recommended-Decision.pdf. Oddly, the recommended decision does not appear on the FTC's own web page tracking the rulemaking. See https://www ftc.gov/legal-library/browse/rules/rulemaking-negative-option-rule.

statutory requirement that the Commission "make all such submissions publicly available."[9] Plainly, Congress did not contemplate that the submissions would be available only after the decision was made.[10]

A second set of changes in the rulemaking procedures affecting the presiding officer is also highly relevant to the current proceedings. As the 1970s rules made their way back to the Commission, a consensus developed in the agency that it should rely more on the presiding officer as a check on the staff's analysis and recommendations.[11] Congress sought to codify this consensus in the 1980 FTC Improvements Act with two new requirements. First, the presiding officer, previously appointed by an official in the Bureau of Consumer Protection, must be independent, responsible only to a chief presiding officer who was not responsible to any other officer or employee of the Commission. The 2021 revisions circumvented this requirement by designating the Chair as the chief presiding officer. Thus, a provision intended to assure the presiding officer's independence was perverted to make the officer report directly to the Chair.[12]

Second, Congress required that the presiding officer "shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[13] The Commission's new rules, however, limit the presiding officer's report to "explaining the presiding officer's proposed resolution of disputed issues of material fact." The

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[9] 15 U.S.C. 57a(b)(1)(B).

[10] The Commission's determination that there are no disputed issues relies as well on a number of other specious claims, including the distinction between "legislative" and "specific" facts that it proposed and rejected in its original rules implementing the statute, the claim that certain factual questions are legal conclusions, and its general conclusion that the practices are "prevalent."

[11] Back to the Future at 21.

[12] Back to the Future at 20.

[13] 15 U.S.C. 57a(c)(1)(B).

Commission offered no explanation or rationale for this change, and made no attempt to explain how it complied with the statutory requirement.[14] Presiding Officers in the negative option and unfair or deceptive fees rulemakings have followed the Commission's rule, rather than the statute, with the negative option report limited to the issue of the overall impact of the rule,[15] and no report at all in the fees rulemaking that allegedly had no disputed issues.

Conclusion

Elections have consequences, and in 2021 the new administration was free to abandon the longstanding bipartisanship it inherited at the Federal Trade Commission. Yet, it did so under conditions starkly different than those of previous change eras. Most important, there was no widespread consensus that the FTC needed to change. After all, among the world's competition agencies, the FTC was the only one consistently to receive five stars.

Much of the credit for that acclaim was owed to the experienced, highly-regarded career staff. The Biden team, echoing concerns over the "deep state," viewed that staff instead with extraordinary hostility. Moreover, other obstacles to radical reform existed, particularly the judiciary that had been responsible for developing much of the law that the new appointees oppose, for example the consumer welfare standard that is at the heart of modern antitrust law.

Past change agents used various tools to implement change, tools the current FTC has eschewed. For example, to improve agency performance and to deal with career staff with whom they disagreed, Casper Weinberger reorganized the agency, creating the modern bureau structure. Jim Miller re-organized on a smaller scale, in the Bureau of Consumer

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[14] Back to the Future at 20.

[15] See Recommended Decision, supra note 7.

Protection, the source of major concern with FTC performance in the late 1970s. Both earlier change agents also used careful strategies to change the law in areas where they faced potential judicial and other obstacles. By contrast, the current FTC has plowed ahead, seemingly more interested in headlines than in results.

Without doubt, the new FTC has succeeded in one area—its impressive campaign of norm busting. But to what end? As our study documents, those who broke the norms appeared to gain considerable self satisfaction at " besting" those with whom they disagreed. Yet, in doing so, they surely have increased the intensity of the opposition they faced. The benefits of broken norms, such as they are, hardly seem worth the costs.

Thank you again for the opportunity to testify today, and I look forward to your questions.