

The Federal Trade Commission's Departure from Past Standards and Norms

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Thank you, Committee Chair Rodgers, Subcommittee Chair Bilirakis, and members for having me here today to talk about the Federal Trade Commission. I am Neil Chilson, the Head of AI Policy at the Abundance Institute.

The Abundance Institute is a mission-driven nonprofit dedicated to creating the cultural and policy environment necessary for emerging technologies to germinate, develop, and thrive, and to thereby perpetually expand widespread human prosperity and abundance.²

The Federal Trade Commission is a critical institution for creating this prosperous, innovative environment. Its dual mission of protecting consumers and promoting competition, when executed well, provide an essential support for the power of markets and technology to deliver prosperity-expanding innovation. That is why I was honored to serve at the FTC for more than four years as a senior advisor to an FTC Commissioner and later, as the FTC Chief Technologist. I worked at the FTC in both Democrat and Republican Administrations.

While agencies and their leaders are typically judged by the substance of their activities, some of the longest-lasting effects that government leaders can have are cultural and procedural. Such changes to practices (or norms) and standards by which an agency operates are not always flashy or publicized. But they can influence agency decision making for decades. I am

¹ The views expressed in this testimony are those of the author and do not necessarily reflect those of the Abundance Institute.

² Learn more at <https://abundance.institute/>.

therefore grateful that this subcommittee is considering the role of Standards and Norms at the FTC, and how they have changed under this administration.

The Importance of Standards and Norms

Standards and norms (a more general term for “practices”) are important means through which institutions like the Federal Trade Commission are governed. Standards in political institutions play a formal and crucial role in ensuring consistency, accountability, and transparency. Standards are codified, usually administratively or legally binding criteria that govern the processes of institutions and the behavior of institutional actors. They create a clear, documented framework for how decisions should be made, how procedures should be followed, and how institutions should interact with the public or other branches of government. For example, standards at the FTC include the statutes under which it operates,³ the federal ethics rules that govern all federal employees,⁴ and the agency’s own ethical guidance⁵ and internal rules of practice. By providing explicit, enforceable guidelines, standards reduce ambiguity and help ensure that institutions and their members operate in a predictable and reliable manner.

Standards also play a key role in enhancing institutional integrity and accountability. Because they are formalized, standards carry administrative or legal weight and are enforceable through disciplinary, judicial, or regulatory mechanisms. When an institutional actor fails to meet a standard—such as a leader violating ethics requirements—the consequences are often formal, such as investigations, disciplinary actions, legal penalties, or even sanctions. This gives standards a level of enforceability and permanence. Additionally, standards tend to be relatively stable, but they can be updated through formal processes.

Because of their formality and the potential severity of consequences, standards are usually formally taught to the institutional actors through documentation and training.

Norms are “rules or expectations that are socially enforced.”⁶ Such rules can be observed and described, but unlike standards they are informal, not codified, and rarely designed. Usually they emerge as patterns in human behavior that are reinforced by social pressure.

Norms play a critical role in all human institutions. They govern the vast majority of individual actions within society. The range of interactions that can occur over time, even within a small

³ See, e.g., Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*

⁴ See, e.g., U.S. Office of Government Ethics, Compilation of Federal Ethics Laws (Jan. 1, 2023), <https://www.oge.gov/Web/oge.nsf/Resources/Compilation+of+Federal+Ethics+Laws>.

⁵ See, e.g., Federal Trade Commission, Office of the General Counsel, *Ethics Guidance for New FTC Employees*, <https://www.ftc.gov/about-ftc/bureaus-offices/office-general-counsel/ethics-guidance-new-ftc-employees>

⁶ Oxford Bibliographies, “Norms” (Jan. 2018), <https://www.oxfordbibliographies.com/display/document/obo-9780199756384/obo-9780199756384-0091.xml>.

group of individuals, is so vast that it would be impossible for anyone to create strict rules to cover every possible situation. Instead, we humans learn from experience, extracting habits, manners, and social conventions that carry over between situations so that we do not start every encounter from scratch.

Likewise, in political institutions norms guide behavior and interactions between political actors. They provide a sense of predictability and stability that formal laws alone cannot achieve, creating an environment where trust and cooperation are possible. For instance, norms in federal agencies around non-partisanship, information-sharing, and the respect for procedural fairness are central to maintaining trust and credibility. These norms create an environment of stability and cooperation, ensuring that the agency operates effectively while maintaining its independence from political pressures.

Unlike standards, norms are usually not formally taught but are learned through specific interactions. They are passed between more experienced institutional actors to less experienced ones.

When these norms are broken, the damage can be particularly pronounced. Eroding the unwritten rules that govern agency behavior weakens both internal and external trust. Internally, staff may become disengaged or politicized, undermining the objective analysis that is essential for decision-making. Externally, regulated parties and the public may view the agency as less legitimate, less predictable, and less impartial. This undermines not only the specific agency but also the broader system of checks and balances. Moreover, once norms are broken, they often don't repair themselves easily—breaking one norm can lead to further deviations, weakening the institution's foundations over time.

Norms are not static. As emergent patterns of behavior, they typically evolve over time to meet new challenges, shifts in public expectations, or political realities. Established norms can and sometimes should be disrupted. After all, not all norms are positive or useful. Institutional bad habits can form. But, like Chesterton's fence, when one encounters a norm, it is worth considering why it exists and what purpose it might serve before tearing it down.⁷

My Experience at the Federal Trade Commission

Below is a short summary of my experience and recollection of norms practiced at the Federal Trade Commission. I focus on norms in this description because, unlike standards, norms are rarely documented, perhaps because the process is difficult. To identify any particular norm I am clustering my experiences into common groups that I believe represent institutional habits.

⁷ See, e.g., G.K. Chesterton, *The Thing: Why I Am a Catholic* (1929); see also Farnum Street, *Chesterton's Fence: A Lesson in Thinking*, <https://fs.blog/chestertons-fence/>.

I am certain I fail to cover all the practices and collective habits of the FTC staff during my time at the agency. But I offer this snapshot as a point of comparison.

I served at the Federal Trade Commission from January 2014 until April 2018, including as an attorney advisor to Commissioner and acting FTC Chair Maureen K. Ohlhausen, and as acting Chief Technologist for the Commission. I advised Commissioner Ohlhausen on all facets of the FTC's consumer protection, privacy, and technology dockets, including investigations, enforcement actions, policy making, cross-agency initiatives, and other matters. I had regular meetings with the Bureau of Competition, Consumer Protection, and Economics management and a variety of division staff, including in the regional offices. I worked with all of the offices, as well, including the General Counsel, the Office of Policy and Planning, the Office of International Affairs, the Office of Congressional Relations, and the then-equivalent of the Office of Technology. My tenure spanned from the Obama administration into the Trump administration, meaning I worked as an attorney advisor both in a Republican and Democratic Administration.

My experience at the agency was overwhelmingly positive. In my role as an attorney advisor to Commissioner Ohlhausen, it was my job to handle specific matters containing recommendations for action from staff. I would interface with staff and with other commissioner offices on a matter, to gather information and to reflect Commissioner Ohlhausen's views.

When I was at the FTC, my strong impression was that staff, including Bureau leadership, saw their job as seeking to earn every Commissioner's vote. Staff worked hard to answer questions, incorporate feedback, and improve the result. I joined the FTC as a relative newcomer to consumer protection law. I am certain that particularly in the early months of my time at the agency, I asked a lot of questions of some very expert and experienced agency lawyers. And yet, even working in a Republican office under a Democratic administration, I never felt ridiculed or ignored, and my requests for information were nearly always met.

When I was at the Commission, every Commissioner, whether majority or minority, was respected. The Chair gave each commissioner the information that they needed to make informative decisions. Time for review was not cut short, and relevant information was not censored. Indeed, on more sensitive matters, Commissioner offices were briefed earlier in the process. Commissioners had access to underlying case files and interviews. Information was not withheld or delayed.

The Commissioners typically took pride in emphasizing that their decisions were guided by the law and facts, rather than politics. They took great care not to appear biased or pre-judge important issues. The Commissioners and staff were keenly aware of the importance of institutional integrity and the importance of the agency to millions of consumers who depend on them.

Cases were investigated by the FTC expert staff, having decades of experience in FTC law and policy. Although Commissioner offices asked questions which may have expanded or narrowed staff investigations, Commissioner offices were not intimately involved in staff investigations. And that makes sense. FTC investigations ought to be based on evidence and law, not politics.

This type of collaborative process also held true with regard to the substantive reports and Part III appeals that the agency issued during that time. I recall working closely with Chair Edith Ramirez's staff and staff of the Bureau of Consumer Protection's Division of Identity and Privacy to incorporate changes and reflect distinct views in the Commission's "Big Data Report."⁸ Staff sought to ground such policy reports in empirical evidence, not the media commentary or anecdotes, and to position such reports as objective, not polemical. I remember a similar experience working with Chair Ramirez's office on controversial Part III cases such as *LabMD*.⁹

Parties appearing before the Commission were also treated with respect. Investigational demands were not seen as fishing expeditions. Staff usually had an articulable theory of harm very early on in an investigation. Requests for meetings with front offices and Commissioners were usually granted. There was a process to request them and parties followed that process. Relevant staff from the Bureau would attend to monitor the questioning and offer support at the Commissioner's request. Very often staff followed up with our office to clarify statements made in the meeting, or to challenge the party's characterization of the facts or law. These meetings not only provided parties with due process, they also incentivized staff to pre-test their cases, and gave the Commissioner contrasting views to weigh. While these meetings only rarely changed the Commissioner's vote on a case, they frequently did improve the resulting case or settlement.

The agency's Office of Public Affairs ultimately reported to the Chair, but on voted matters press releases were usually circulated prior to release and the Office was open to feedback. They sought to be objective in language, and respected the opinions of all Commissioners.

Throughout the normal business of the agency during my tenure, the Bureau of Economics ("BE") played a critical role. On every single substantive consumer protection or competition case, BE offered the Commissioners a memo analyzing the economic components of the case and recommending whether or not to proceed. Often, in consumer protection cases, BE's work quantified the likely harm and evaluated the appropriate settlement or redress amount. BE did not always agree with BCP or BC or with the Chair, either on the economic value of bringing a case, or on the preferred harm calculation or settlement amount. However, BE staff was free to share their views with our office.

⁸ Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (January 2016), <https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report>.

⁹ In the Matter of LabMD, Inc. Opinion of the Commission (July 29, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf>.

These discussions did not water down or weaken the result. They strengthened the Commission's overall understanding of the situation and I believe they strengthened the results, too, by stress-testing the cases internally.

Sometimes there was a difference of opinion, which is exactly how the FTC was set up. We certainly didn't "win" every argument. But every decision was approached with a basic respect for the opinion of the other side, and with a belief that one's ideas are improved through challenge. That openness to challenge and confidence that positions can withstand and be improved by debate pervaded the FTC.

This is not to say the standards and norms at the FTC were flawless and unimprovable when I was there. Indeed, one of the key early actions of acting Chair Ohlhausen was a series of initiatives to "eliminate wasteful, unnecessary regulations and processes."¹⁰ The initiatives included case review to end stale investigations, identifying unnecessary regulations no longer in the public interest, better integrating the Bureau of Consumer Protection and Economics, and streamlining information demands to reduce the burdens on companies and individuals (often third parties not under investigation) and FTC staff.¹¹

The FTC Today

Today, when I hear about the operation of the agency, there appear to have been significant changes in the norms governing the agency. Just to offer a contrast to my narrative on past norms above:

- Minority Commissioner offices are not receiving timely briefings or notice in important matters.¹²
- Staff, at least at the Bureau leadership level, no longer view their job as persuading all commissioners. (To be fair, this may in part be an artifact of the Commission being an entirely partisan, 3-0 organization for nearly a year.)¹³
- The Bureau of Economics has reportedly stopped offering recommendations on individual matters.

¹⁰ Federal Trade Commission, Press Release, *Process Reform Initiatives are Already Underway at the Federal Trade Commission* (April 17, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade-commission>.

¹¹ *Id.*

¹² J. Howard Beals and Timothy J. Muris, *Achieving Change at the Federal Trade Commission: Success and Failure at 9-10* (May 6, 2024), <https://cei.org/studies/achieving-change-at-the-federal-trade-commission/> (hereinafter "Achieving Change") (citing multiple statements by former Commissioners Wilson and Phillips remarking on short timelines and other procedural disadvantages).

¹³ The Commission had no Republican commissioners from Commissioner Wilson's resignation on March 31, 2023, until Commissioner Holyoak's swearing in on March 35, 2024. https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart_timeline.pdf.

- Defending parties are sometimes being served complaints or lawsuits with no or less opportunity to meet with leadership.¹⁴

Other norms¹⁵ that have been breached

- Lina Khan was nominated as a Commissioner and then, after she was confirmed by Congress, elevated to Chair.¹⁶
- “Zombie votes” from a Commissioner who had already left the Commission.¹⁷
- Leadership prohibited staff from public speaking engagements.¹⁸
- 6(b) studies that largely or entirely ignore the industry submissions¹⁹
- External pressure on a Democratic Commissioner threatening punishment for daring to raise some concerns about an enforcement action.²⁰
- Unusual use of unpaid external consultants as full-time.²¹
- The Chair ignored the advice of the Designated Agency Ethics Official with regard to recusal from a matter.²²
- The Commission refused to release the related DAEO report and in fact voted to redact any discussion of it from a Commissioner’s dissent²³

These are significant changes to the practice of the FTC, and many of them break with FTC patterns that have held for decades.

¹⁴ *Achieving Change* at 8-9.

¹⁵ It is possible that some of the activities below also violate agency standards.

¹⁶ *Achieving Change* at 8.

¹⁷ Leah Nysten, ‘Zombies’ to the rescue: The arcane voting rule that could save Dems’ antitrust agenda (Nov. 8, 2021), <https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767>.

¹⁸ Leah Nysten and Betsy Woodruff Swan, *FTC staffers told to back out of public appearances* (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>.

¹⁹ Daniel J. Gilman, *Reports of the Current FTC’s Intellectual Integrity Have Been Greatly Exaggerated*, Truth on the Market (July 10, 2024), <https://truthonthemarket.com/2024/07/10/reports-of-the-current-ftcs-intellectual-integrity-have-been-greatly-exaggerated/> (comparing the 2005 PBM Report to the recently released report).

²⁰ This is an example of external norms around the Commission breaking down. See Chairs Rodgers and Bilirakis Open Investigation into Left-Wing Influence and Intimidation at the FTC (July 11, 2023), <https://energycommerce.house.gov/posts/chairs-rodgers-and-bilirakis-open-investigation-into-left-wing-influence-and-intimidation-at-the-ftc>.

²¹ Federal Trade Commission, Office of the Inspector General, *Audit of the Federal Trade Commission’s Unpaid Consultant and Expert Program* (Aug. 1, 2022), <https://oig.ftc.gov/sites/default/files/reports/2023-08/2022-08-01OIGauditreportunpaidconsultantsFINAL.pdf>.

²² *Achieving Change* at 12-14.

²³ In the matter of Meta Platforms, Inc., *et al*, Dissenting Statement of Commissioner Christine Wilson (Feb. 1, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09411orderpetrecusalwilsondissent.pdf; *Achieving Change* at 14-15.

What benefits, at what cost?

These shortcuts and norm-violating actions could be understandable as merely tough politics. That stance itself would be a change for an agency that, especially on the consumer protection side, has an overwhelmingly bipartisan mission of preventing and redressing fraud against consumers. Still, one might understand that a senior leadership that has criticized the agency for doing too little might be willing to cut corners and violate norms in the pursuit of increased activity. It might be ok to break eggs to make an omelet.

Some things have been broken, certainly. Norm violations at the agency have been costly as measured by employee perception of leadership and the agency overall. This has been documented thoroughly by the Phoenix Center’s review of official survey data:

“In 2020, senior leadership at the agency ranked first in staff’s view of the honesty and integrity of senior leadership and their respect for that leadership. In 2021, and again in 2022, FTC staff’s views on the honesty and integrity of senior leadership and respect for that leadership declined precipitously, placing the agency in last place on these attributes among its peers—an unprecedented decline.”²⁴

These declines dragged the overall engagement and satisfaction score for FTC employees from 2nd of 25 mid size federal agencies to 22nd of 25.²⁵ While the overall numbers have recovered somewhat to the middle of the pack, the *Effective Leadership: Senior Leaders* scores remains 19th of 23 mid sized agencies.²⁶ In fact, the past three years have delivered the FTC’s three lowest *Effective Leadership: Senior Leaders* scores on this survey since tracking began in 2005.²⁷

But has the breaking of norms meant the agency has moved faster, or more effectively? Not by the numbers. The FTC’s enforcement database contains 442 consumer protection-related records compared to 539 records for the Trump administration, and 504 records for Obama’s second term at this same point. On the competition mission, the numbers are 178 records under the Biden administration, 166 records under the Trump administration, and 150 under the second Obama term. This record count is a very rough approximation, and doesn’t account for qualitative differences in workloads, but we’re not seeing dramatically different levels of activity. Commissioners Philips and Wilson offered several critical assessments of the workload of the agency that emphasize that the agency has fallen behind past administrations in the number of cases brought.²⁸

²⁴ George S. Ford, *An Agency in Crisis: Employee Satisfaction at the FTC Continues to Decline* (April 27, 2023), PHOENIX CENTER PERSPECTIVES 23-01, <https://ssrn.com/abstract=4520745>.

²⁵ <https://bestplacestowork.org/rankings/detail/?c=FT00>

²⁶ *Id.*

²⁷ *Id.*

²⁸ Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson,

Sometimes, when you break eggs, you just make a mess.

Conclusion

I thank this subcommittee for the opportunity to offer my own thoughts on the FTC's functioning and the importance of its norms and standards. The Federal Trade Commission is a vital federal institution, and we should all want it to function well even when we disagree with its substantive direction.

Thank you, and I look forward to your questions.

Federal Trade Commission (Sept. 20, 2022),
https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips%20Wilson%20dissent%20oversight%20hearing%20FINAL%2009.16.22%20%28002%29.pdf.