

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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August 25, 2022

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

Based on a recent report from the Federal Trade Commission (FTC) Office of Inspector General (OIG), the FTC seems to be flouting federal law to rely on unpaid and unaccountable consultants and so-called “experts” to perform core functions at the agency.¹ Internal documents show that these officials are likely performing work that should be done by FTC staff.² These revelations are especially troubling because, as the OIG explained, the FTC has “expanded the[] use” of unpaid consultants and experts during your tenure.³ We are conducting oversight of the OIG’s revelations and the FTC’s use of non-FTC employees to perform agency functions.

Federal law allows agencies to bring on consultants and experts,⁴ but the law sets restrictions on what work these officials may perform. For example, agencies may not use consultants or experts “[t]o perform managerial or supervisory work . . . , to make final decisions on substantive policies, or to otherwise function in the agency chain of command”⁵ Agencies also may not use consultants or experts “[t]o do work performed by the agency’s regular employees” or “[t]o fill in during staff shortages.”⁶ The FTC’s internal manual reflects

¹ See OFF. OF INSPECTOR GEN., FTC, No. A-22-06, AUDIT OF THE FEDERAL TRADE COMMISSION’S UNPAID CONSULTANT AND EXPERT PROGRAM 7 (2022) (quoting 5 C.F.R. § 304.108(a)), https://www.ftc.gov/system/files/ftc_gov/pdf/2022-08-01_OIGauditreport_unpaidconsultants_FINAL.pdf [hereinafter “OIG Report”]; see also Allum Bokhari, *FTC Inspector General Reprimands Lina Khan for Hiring Unpaid ‘Experts,’* BREITBART (Aug. 3, 2022); Leah Nylen, *FTC Under Khan Faulted by Watchdog on Hiring Unpaid Experts,* BLOOMBERG (Aug. 3, 2022).

² See OIG Report, *supra* note 1, at 6 (“The language included in several of the agency’s unpaid consultants’ and experts’ justifications and approvals approaches the proximity of a ‘policy’ function reserved for federal employees only” (footnote omitted)).

³ See *id.* at 4; see also *id.* at 3–4 (“The FTC has deployed unpaid consultants and experts at an increasing rate, including adding 9 such positions starting in FY 2021 through March 2022 (versus 2 for FYs 2019–2020 combined).” (footnote omitted)).

⁴ 5 U.S.C. § 3109(b) (“When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services.”).

⁵ 5 C.F.R. § 304.103(b)(3).

⁶ *Id.* § 304.103(b)(4)–(5).

these restrictions, requiring that experts and consultants may not perform work “of an ongoing nature more appropriately performed by permanent employees” or “of a policy and/or decision making or managerial nature.”⁷ In addition, agencies that utilize consultants or experts “must establish and maintain a system of controls and oversight” to ensure compliance with the relevant statute and regulations.⁸

Under your tenure, the FTC is flouting federal law concerning the use of consultants and experts. For example, although federal law requires that consultants may not perform managerial work or decide matters of substance, internal FTC documents reveal that the consultants “will play an integral role in the Commission’s strategic direction” and will have “wide latitude of responsibility.”⁹ The documents also note that the consultants will “serve as . . . visionary leader[s] on policy and strategic initiatives”; will “work together with staff and attorneys throughout the FTC to provide case support . . . , policy research and development, [and] competition and consumer advocacy”; and will “provide the Chair advice and analysis to inform FTC policy.”¹⁰ In sum, the internal FTC documents describe how you have improperly empowered these consultants and experts to drive the agency’s radical, anti-free market agenda.¹¹

In addition, the OIG documents how despite the FTC’s duty to maintain a system of controls and oversight, your agency “had neither a system of controls nor guidance on consultants’ and experts’ scope of work—particularly, guidance identifying allowable and prohibited activities.”¹² The FTC’s failure to maintain these safeguards makes it even more likely that consultants are performing work that should be done by FTC staff. As the OIG explained,

⁷ See OIG Report, *supra* note 1, at 5 (citing the FTC’s *Administrative Manual*). The OIG report points out that no law, regulation, or internal FTC manual fleshes out exactly what work should be performed by a permanent government employee. *Id.* (“The law, implementing regulations, and the Administrative Manual do not expand on what duties should be considered the ongoing work more appropriately performed by permanent employees serving a governmental function.”). But the Federal Acquisition Regulation and Office of Management and Budget (OMB) guidance offer helpful examples. See *id.* (listing these examples that, per OMB guidance, must be performed by government employees: “(a) determination of agency policy, such as determining the content and application of regulations; (b) determination of federal program priorities or budget requests; (c) selection or non-selection of individuals for federal government employment, including the interviewing of individuals for employment; and (d) direction and control of federal employees.”); *id.* at 6 (listing these examples from a different OMB guidance document that must be performed by a government employee: “the determination of agency policy, such as determining the content and application of regulations”; “the determination of budget policy, guidance, and strategy”; “the determination of federal program priorities or budget requests”; “the selection or non-selection of individuals for federal government employment, including the interviewing of individuals for employment”; and “the direction and control of federal employees”).

⁸ 5 C.F.R. § 304.108(a) (“Each agency using 5 U.S.C. 3109 must establish and maintain a system of controls and oversight necessary to assure compliance with 5 U.S.C. 3109 and these regulations.”).

⁹ OIG Report, *supra* note 1, at 7.

¹⁰ *Id.*

¹¹ *Cf. id.* at 8 (“Upon arrival at the agency, and throughout their tenure there, the FTC considers its unpaid consultants and experts who advise senior Commission leaders as making significant contributions to the mission and becoming integral to the agency’s strategic direction.”).

¹² *Id.* at 7.

without such controls, “the FTC cannot reasonably ensure that unpaid consultants and experts will be restricted from performing inherently governmental functions.”¹³

The FTC’s flouting of federal law is not some harmless technical violation. As one commentator, Allum Bokhari, pointed out, “[t]he lack of formal employment contracts allowed Khan’s FTC to avoid the usual checks and balances involved in hiring federal officials”¹⁴ The agency’s disregard of the law opens it up to conflicts of interest,¹⁵ and the lack of guardrails will make it easier for the Biden FTC to continue promoting a radical, far-left orthodoxy.¹⁶ Regrettably, this is not the first time that the FTC under your leadership has ignored its obligations to the law.¹⁷

As the Committee conducts oversight of the findings of the OIG report and the FTC’s use of consultants and experts, we ask that you produce the following documents and information:

1. A list of all experts or consultants, along with their current and prior titles, the FTC has retained from January 20, 2021, to the present, as well as:
 - a. A description of the work each expert or consultant performed or is currently performing, including any work on or related to policy issues.
 - b. A description of each expert’s or consultant’s authority and responsibilities.
 - c. The name(s) of all FTC staff, along with their current and prior titles, that each expert or consultant has reported to (or currently reports to) or has been supervised by (or is currently supervised by).
 - d. The name(s) of all FTC staff, along with their current and prior titles, that each expert or consultant has supervised (or currently supervises), managed (or currently manages), or overseen (or currently oversees) in any way.

¹³ *Id.* at 8; *see also id.* (“Without clear boundaries on the roles and responsibilities of FTC managers, unambiguous guidance on prohibited activities of unpaid consultants and experts, and an effective process of monitoring and review over their activities, the FTC runs a greater risk that non-federal employees will either undertake or be assigned to prohibited duties.”).

¹⁴ Bokhari, *supra* note 1.

¹⁵ *See* OIG Report, *supra* note 1, at 9 (“Without the development of restrictive agreements on allowable activities—and greater communication with pertinent agency officials—the agency lacks an important layer of assurance against potential ethical dilemmas, such as conflicts of interest.”).

¹⁶ *See* Bokhari, *supra* note 1 (explaining that the FTC’s “avoid[ing] the usual checks and balances involved in hiring federal officials[] creat[es] the opportunity for leftist Khan to bring in radical progressives”); *cf.* Allum Bokhari, *FTC to Hire Leftist Wacko Meredith Whittaker, Ex-Googler Who Attacked White Women for Trump Support*, BREITBART (Nov. 2, 2021) (“The appointment of Whittaker proves that these previous comments from FTC Democrats weren’t simply pandering — they really intend to use the FTC’s power to promote a far-left agenda in the tech industry, and are elevating far-left appointees to make it happen.”).

¹⁷ *See, e.g.*, Letter from Rep. Jim Jordan et al., Ranking Member, H. Comm. on the Judiciary, to Hon. Lina Khan et al., Chair, FTC, at 2 (July 29, 2021) (“The Democratic Commissioners have imposed new obligations on American businesses that exceed the agency’s authority in statute. Whether in this context or elsewhere, the FTC may not ‘completely ignore[e]’ the ‘inconvenient’ Congressional mandates and prohibitions.” (alteration in original) (citation omitted) (footnote omitted)), <https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-29-JDJ-CMR-JC-to-FTC.pdf>; Diane Bartz, *U.S. Chamber of Commerce sues FTC, demanding access to records*, REUTERS (July 14, 2022) (“In the last two years, the Commission has embarked on a series of unlawful and self-aggrandizing actions — often in secret.” (citation omitted)).

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- e. All documents or agreements that memorialize or otherwise reflect the scope of each expert's or consultant's relationship with the FTC.
 - f. The name(s) of all FTC staff, along with their current and prior titles, involved in the decision to bring on each expert or consultant.
 - g. All documents and communications referring or relating to the FTC's decision to bring on each expert or consultant.
 - h. All documents and communications between or among the FTC and any other federal agency, including the Office of Personnel Management and the Executive Office of the President, referring or relating to the FTC's use of experts or consultants.
 - i. All documents and communications between or among the FTC and any nongovernmental entity, including any academic entity, referring or relating to the FTC's use of experts or consultants.
2. All documents, communications, and other materials provided to the FTC Office of Inspector General as part of its audit of the FTC's unpaid consultant and expert program.
 3. A description of any actions the FTC takes or decisions it makes, including memorializing documentation, in response to the FTC Office of Inspector General's recommendations that are set out in its August 1, 2022, audit, as well as any steps to remedy the improper use or conduct of experts and consultants.

Please produce all documents and information as soon as possible but no later than 5:00 p.m. on September 8, 2022. Please also treat these obligations as ongoing and applicable for any consultants or experts retained after the receipt of this letter.

Furthermore, this letter serves as a formal request to preserve all existing and future records and materials relating to the topics addressed in this letter. You should construe this preservation notice as an instruction to take all reasonable steps to prevent the destruction or alteration, whether intentionally or negligently, of all documents, communications, and other information, including electronic information and metadata, that are or may be responsive to this congressional inquiry. This instruction includes all electronic messages sent using your official and personal accounts or devices, including records created using text messages, phone-based message applications, or encryption software.

Thank you for your prompt attention to this matter.

Sincerely,



Jim Jordan
Ranking Member

cc: The Honorable Jerrold L. Nadler, Chairman, Committee on the Judiciary

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The Honorable Noah J. Phillips, Commissioner, Federal Trade Commission
The Honorable Rebecca K. Slaughter, Commissioner, Federal Trade Commission
The Honorable Christine S. Wilson, Commissioner, Federal Trade Commission
The Honorable Alvaro Bedoya, Commissioner, Federal Trade Commission