



Office of the Chair

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

July 12, 2023

The Honorable Cathy McMorris Rodgers  
Chair  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Jim Jordan  
Chair  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairs Rodgers and Jordan:

I am writing in response to your June 28, 2023, letter to the Federal Trade Commission. This production includes documents, which are Bates stamped FTC-JR000000001 - FTC-JR000000163.

As I stated before, I consulted with the Designated Agency Ethics Official (“DAEO”) and acted consistently with her legal guidance, given that my participation in the Meta/Within matter did not violate federal ethics laws. My verbal consultations with the DAEO were informative and instructive and were part of my decision-making process.

By way of background, federal ethics rules give the DAEO the authority to make binding decisions to disqualify an employee from matters involving a financial conflict of interest or a covered relationship,<sup>1</sup> but not from matters presenting other potential issues.<sup>2</sup> For matters where parties before the Commission raise concerns *other than* conflicts arising from financial interests or covered relationships, the law requires the employee rather than the DAEO to make the decision about whether to recuse.<sup>3</sup> The employee may ask the DAEO for guidance, analysis, or nonbinding advice, but the employee must ultimately make her own assessment regarding recusal.

Meta did not allege that I had a conflict of interest arising from a financial interest or covered relationship. Indeed, I have no financial interests in Meta or in any other large technology company, and I have no immediate family ties to Meta or any other large technology company. Instead, Meta raised issues about the appearance of impropriety under 5 C.F.R. § 2635.501(a). Because Meta was raising issues unrelated to those stemming from a financial

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<sup>1</sup> See 5 C.F.R. §§ 2638.104(c)(6), 2635.502(c).

<sup>2</sup> See *id.* §§ 2635.501(a), 2635.502(a)(2).

<sup>3</sup> See *id.*

conflict of interest or covered relationship, my consultations with the DAEO was discretionary and focused on understanding the legal framework that I needed to apply in order to make a decision on recusal. Following that discussion, I reviewed closely the relevant legal precedent and made a decision not to recuse from the matter.

With respect to the first and second request in your June 28, 2023, letter, I am enclosing the following documents:

- Commission decision on Recusal (February 1, 2023)
- Commissioner Wilson's redacted dissent regarding Recusal (February 1, 2023)
- Commissioner Wilson's unredacted dissent regarding Recusal (February 1, 2023)
- Chair Khan's Internal Statement Regarding the Petition for Recusal (November 18, 2022)
- Office of General Counsel Memo on the Deliberative Process Privilege and the August 2022 DAEO Memo (December 23, 2022)
- Federal Ethics Response to Meta Petition for Chair Khan's Recusal (August 31, 2022)
- Federal Ethics Response to Petitions for Chair Khan's Recusal (July 21, 2021)
- Email from Deputy General Counsel to Chair Khan (July 20, 2022)
- Calendar entries (August 3, 2022)

In addition to the unredacted dissent of Commissioner Wilson's requested in your letter, I am providing the redacted dissent so the Committee may clearly and conveniently see the redactions. I am also including the Commission decision denying the recusal petition. Although I was not involved in this Commission decision, the opinion explains (at pages 15-17) the majority's determination not to waive the deliberative process privilege over the portions of the DAEO memo referenced and quoted by Commissioner Wilson in her dissent. Moreover, I am including my statement laying out the legal analysis that led me to decline to recuse.

Further, I am including an Office of the General Counsel (OGC) memo from December 2022, which explains why the August 2022 DAEO memo is covered by the deliberative process privilege and thus, under the Commission's rules, requires Commission authorization to be released *in camera* or to the public. As the OGC memo notes, the Commissioners participating in voting on recusal asked whether the deliberative process privilege covered the DAEO memo, what that coverage meant for the ability of Commissioners to quote from or reference the memo or other OGC ethics staff advice, and whether OGC's analysis would differ if those quotations and references were released *in camera* to the parties to the case but redacted from any public version.

Additionally, I am including the August 2022 DAEO memo and the July 2021 DAEO memo that was attached to it. The August 2022 DAEO memo explains that under the applicable ethics regulations, it was up to me whether to recuse myself (at page 2), that no ethics authorization was required (at page 7), and that my participation was not an ethics violation (at pages 13 and 14).<sup>4</sup> The attached July 2021 DAEO memo concluded that I was not required to recuse myself from participating as a prosecutor/investigator in the Commission's antitrust matters concerning Amazon and Facebook.

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<sup>4</sup> See also Office of General Counsel Memo on the Deliberative Process Privilege and the August 2022 DAEO Memo (December 23, 2022), same conclusion at 5-8.

Finally, I am enclosing calendar entries reflecting my meetings on this matter with the General Counsel, the DAEO, and the Deputy General Counsel for Legal Counsel and an email containing written guidance from the Deputy General Counsel for Legal Counsel. The Deputy General Counsel concluded that she did “not see the Chair’s prior statements, or the statements in the HJC report, as sufficient to justify what would amount to a company-wide disqualification of the Chair from participating in adjudications involving Meta.” Prior to the Commission’s decision on recusal, I did not receive any written guidance or analysis from the DAEO. After the commission vote on the recusal, I gained access to all of the documents associated with the Commission’s consideration of the recusal petition.

Courts have recognized that recommendations provided by ethics officials are protected by deliberative process privilege, because public disclosure of such recommendations could chill communications between agency employees and ethics officials.<sup>5</sup>

With respect to the third request in your June 28, 2023, letter, I am enclosing the following documents:

- Four Calendar entries reflecting hearing preparation
- Email with Statutory one pager attached

Much of the information provided in this letter and its attachments is confidential, and the Commission requests that the Committee and its staff not disclose any of the nonpublic information provided. Specifically, some of the information that I am providing includes internal staff analyses and recommendations, which are pre-decisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5).<sup>6</sup> Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation.<sup>7</sup> Finally, some of this information may also be exempt from mandatory public disclosure under FOIA Exemption 5 by the attorney-client privilege.<sup>8</sup>

Commission regulations and practice require a Commission vote to release nonpublic information in response to requests from congressional committees and subcommittees.<sup>9</sup> To respond to this request in a timely manner, the Commission held a vote to authorize staff to provide responsive information to the Committee. Although FOIA exemptions do not provide

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<sup>5</sup> See, e.g., *Judicial Watch v. U.S. Dep’t of State*, 306 F. Supp. 3d 97, 114 (D.D.C. 2018) (finding that deliberative process privilege protected ethics recommendations made by State Department officials, and noting that “release of documents of this sort would chill communications within an agency about how to ensure that nominees for high-level agency positions are identifying and managing potential conflicts of interest *before* any failure to do so erodes the public’s confidence in the agency and agency officials”); *Broderick v. Shad*, 117 F.R.D. 306, 310-11 (D.D.C. 1987) (finding that deliberative process privilege protected the “recommendations, opinions, or conclusions” of ethics officials, and that the “honest and frank communication” needed for agency ethics work “might be stifled by public disclosure”).

<sup>6</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>7</sup> *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

<sup>8</sup> *Mead Data Cent. Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977); *Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 375-77 (4th Cir. 2009).

<sup>9</sup> See 16 C.F.R. § 4.11(b).

authority to withhold such information from this Congressional Committee,<sup>10</sup> because the information provided in the briefing would not be available to the public under the FOIA or otherwise, the Commission requests that the Committee maintain its confidentiality.

Sincerely,

A handwritten signature in cursive script that reads "Lina Khan".

Lina M. Khan  
Chair, Federal Trade Commission

cc: Frank Pallone  
Ranking Member  
House Committee on Energy and Commerce

Jerrold Nadler  
Ranking Member  
House Committee on the Judiciary

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<sup>10</sup> See 5 U.S.C. § 552(d).