

Congress of the United States

Washington, DC 20515

June 28, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Chair Khan:

The Committee on the Judiciary and the Committee on Energy and Commerce are conducting oversight of your adherence to federal ethics guidance and whether you misled Congress about following ethics advice from the Federal Trade Commission's (FTC) Designated Agency Ethics Official (DAEO). A recent report suggests that you declined to fully follow ethics advice that you recuse yourself from a pending FTC matter in 2022, despite testifying under oath in 2023 that you have always followed nonpartisan ethics guidance. Accordingly, we write to request information and documents related to your apparent ethical failure and misleading testimony to Congress.

On April 18, 2023, you testified before an Energy and Commerce subcommittee hearing regarding the Federal Trade Commission's (FTC) budget.¹ At that hearing, Chair Rodgers asked you: "Are there any instances where you've not followed the DAEO's advice?"² After pausing for a few seconds, you responded, "no," and then attempted to explain your response by stating, "I have consulted with the DAEO and have taken actions that are consistent with the legal statements the DAEO has made."³ Chair Rodgers then asked Commissioners Rebecca Slaughter and Alvaro Bedoya, "would you have concerns with an FTC Commissioner not following the recommendation of the DAEO?"⁴ Both Commissioners Slaughter and Bedoya refused to answer the question.⁵

On June 16, 2023, a journalist published a nonpartisan ethics memorandum, dated August 31, 2022, and written by the FTC's DAEO, analyzing your ability to sit as a judge in a specific proceeding before the FTC.⁶ According to the ethics memorandum, the DAEO "recommend[ed]

¹ *Fiscal Year 2024 Federal Trade Commission Budget: Hearing Before the Subcomm. on Innovation, Data, and Com. of the H. Comm. on Energy and Com.*, 118th Cong. (2023).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Leah Nylen, *Lina Khan Rejected FTC Ethics Recommendation to Recuse in Meta Case*, BLOOMBERG (June 16, 2023); Memorandum from Lorielle L. Pankey, Designated Agency Ethics Official, Fed. Trade Comm'n, to Christine

Chair Khan recuse to avoid an appearance of partiality concern pursuant” to federal ethics regulations.⁷ The relevant ethics regulations specify that even if there is no *per se* conflict of interest, “where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter”⁸ The DAEO concluded that a reasonable person would question your partiality in the matter at hand, noting her “strong reservations with Chair Khan participating as an adjudicator in this proceeding.”⁹

Despite this advice from the FTC’s nonpartisan DAEO, you declined to recuse yourself from that matter.¹⁰ In a November 2022 statement addressing your decision, you relied on a court opinion in a separate matter that examined the actions of a prosecutor.¹¹ The federal ethics analysis for acting as a prosecutor, however, is different than the analysis for acting as an adjudicator in an administrative proceeding.¹² You failed to address the ethical concerns of acting as an adjudicator in your statement.¹³ Indeed, in the DAEO’s memorandum, she explicitly noted the distinction between her nonpartisan assessment of your role as an adjudicator versus a prosecutor.¹⁴

The recent disclosure of the DAEO’s memorandum suggests that your response to Chair Rodgers during the recent subcommittee hearing omitted an important recommendation by the DAEO and raises serious questions about your commitment to the fair and impartial administration of the FTC’s authorities. Given the gravity of this situation, please promptly provide the following documents and information to the Committees:

1. All documents and communications, including any documents and communications already produced to the Energy and Commerce Committee on April 19, 2023, referring or relating to whether the DAEO recommended to you that you recuse yourself to avoid an appearance of partiality concern pursuant to 5 C.F.R. § 2635.502.
2. All documents and communications referring or relating to your ethics analysis including, but not limited to, all communications between your office and FTC ethics staff.
3. All documents and communications referring or relating to your testimony before a subcommittee of the Energy and Commerce Committee on April 18, 2023.

Please produce this information as soon as possible but no later than 5:00 p.m. on July

S. Wilson, Commissioner, Fed. Trade Comm’n (Aug. 31, 2022) [hereinafter DAEO Memorandum]; *see also* Chelsey Cox, *FTC Chair Lina Khan refused to sit out agency’s case against Meta despite ethics concerns*, report says, CNBC (June 16, 2023).

⁷ DAEO Memorandum, *supra* note 6, at 1.

⁸ 5 C.F.R. § 2635.502(a).

⁹ DAEO Memorandum, *supra* note 6, at 1-2.

¹⁰ Internal Statement of Lina M. Khan, Chair, Fed. Trade Comm’n at 5 (Nov. 18, 2022).

¹¹ *Id.*

¹² *See* DAEO Memorandum, *supra* note 6, at 3.

¹³ Internal Statement of Lina M. Khan, Chair, Fed. Trade Comm’n at 5 (Nov. 18, 2022).

¹⁴ *See* DAEO Memorandum, *supra* note 6, at 9 n.25.

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12, 2023. The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the “[p]rotection of trade and commerce against unlawful restraints and monopolies.”¹⁵ The Committee on Energy and Commerce is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to “[c]onsumer affairs and consumer protection” and “[i]nterstate and foreign commerce generally”¹⁶

If you have any questions about this matter, please ask your staff to contact Judiciary Committee staff at (202) 225-6906 or Energy and Commerce Committee staff at (202) 225-3641. Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Chairman
Committee on the Judiciary



Cathy McMorris Rodgers
Chair
Committee on Energy and Commerce

cc: The Honorable Jerrold Nadler, Ranking Member
Committee on the Judiciary

The Honorable Frank Pallone, Ranking Member
Committee on Energy and Commerce

¹⁵ Rules of the U.S. House of Representatives, R. X (2023).

¹⁶ *Id.*