



Office of the Chair

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

September 9, 2022

The Honorable Mike Lee  
United States Senate  
Washington, DC 20510

Dear Senator Lee,

Thank you for your August 18, 2022 letter requesting information about the agency's use of unpaid consultants and experts. I appreciate the opportunity to address the concerns you raised and to clarify some misunderstandings.

At the outset, I want to emphasize that the work performed by the unpaid consultants and experts was consistent with all applicable statutes, regulations, and agency guidance. Like other federal agencies, the FTC uses its authority under the law to bring on outside consultants or experts—paid, unpaid, or detailed from other agencies—to fill any subject matter gaps. In doing so, the FTC ensures that the work performed by such individuals complies with applicable statutes, regulations, and agency guidance. The Office of the Inspector General (OIG) reviewed the agency's hiring process under multiple leaders and found no violations of law, but nonetheless made recommendations for improving internal oversight to mitigate future risks. The FTC has been and will continue to improve our internal processes, including by taking steps recommended by the OIG.

**1. Please identify every unpaid consultant or expert, broadly construed, that has been retained by the FTC since January 1, 2021.**

Last	First	Appointment Type	Position Title on Form 189
Calcano	Alejandro	Unpaid Consultant	Technology Advisor
Kak	Amba	Unpaid Consultant	Technology Advisor
Kwoka	John	Unpaid Consultant	Advisor and Chief Economist to the Chair
Martin	Erik	Unpaid Consultant	Technology Advisor
Mathur	Varoon	Unpaid Expert	Technology Advisor
Matwyshyn	Andrea	Unpaid Expert	Senior Special Advisor
Pham Evans	Kathy	Unpaid Consultant	Technology Advisor
Waller	Spencer	Unpaid Consultant	Senior Advisor to the Chair
West	Sarah	Unpaid Consultant	Technology Advisor
Whittaker	Meredith	Unpaid Consultant	Senior Technology Advisor

**2. For each person identified in response to Question (1):**

**a. Provide a copy of the person’s current resume or CV.**

Each individual’s current resume or CV is attached.

**b. Provide a copy of any description of the person’s intended scope of work at the FTC, including any contract or agreement between the person and the FTC. If no such document exists, please describe the intended scope of the person’s work at the FTC.**

Each individual’s FTC Form 189, “Justification and Approval of Employment of Expert/Consultant” is attached, as well as an amended “Summary of Duties” (box 5 on the Form 189) for each individual.

**c. Identify each FTC component in which the person worked and who they report or reported to.**

Andrea Matwyshyn works in the Bureau of Consumer Protection (BCP) and reports to Samuel Levine, BCP Director. The remaining individuals listed in the response to Question 1 work or worked in the Office of Policy Planning (OPP). The work of the technologists has been overseen by the FTC’s former Chief Technologist Erie Meyer and then, after Erie’s departure, by Acting Chief Technologist Stephanie Nguyen,<sup>1</sup> Chief of Staff Jen Howard, and Office of Policy Planning Director Elizabeth Wilkins. Two consultants, John Kwoka and Spencer Waller, have functioned as advisors to the Chair and were overseen directly by the Chair in that capacity.

**d. Describe the services rendered and functions performed in each component by the person.**

Please see the “Summary of Duties” section in each Form 189, as amended.

**e. Identify any and all organizational affiliations—whether personal, professional, or academic—held by the person during the time they rendered services to the FTC.**

Please see each individual’s resume or CV.

**f. Identify who reviewed and approved the consultant’s or expert’s application.**

Please see the “Approvals” section in each Form 189.

**g. Indicate whether or not the person received ethics training.**

Each unpaid consultant or expert was reviewed by the FTC’s Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each unpaid consultant or expert was required to complete a confidential financial disclosure report (OGE Form 450) and,

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<sup>1</sup> Stephanie Nguyen was appointed Chief Technologist on a permanent basis in August 2022.

based on those disclosures, the FTC Ethics Team provided tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like all other employees, each unpaid consultant or expert attended ethics orientation once they started at the FTC. Each unpaid consultant or expert also received and continues to receive annual ethics training.

**3. How often were you updated and informed of the unpaid consultants or experts work?**

I regularly receive updates on the agency's work from staff and leadership across the agency. These updates encompassed projects on which the unpaid consultants or experts were working.

**4. Since you took over leadership of the agency, how has it defined "consultant" and "expert"?**

Both before and during my tenure as Chair, the FTC has used the definitions of "consultant" and "expert" found in 5 C.F.R. § 304.102.<sup>2</sup>

**a. What criteria were used to recruit the unpaid consultants and experts?**

The FTC used the criteria listed in 5 C.F.R. § 304.102 to recruit the unpaid consultants and experts. See the response to Question 4.

**5. Did the FTC make these positions publicly available for members of the public to apply, such as through USAJobs.gov or a similar method?**

No. As noted above in the response to Question 4(a), the FTC recruited unpaid consultants and experts based on the criteria in 5 C.F.R. § 304.102—*i.e.*, FTC reached out to individuals based on their publicly known knowledge, experience, education, competence, or skill in a particular area.

**6. For any position that was not publicly noticed, please answer:**

**a. How did the consultant or expert learn of the opening?**

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<sup>2</sup> See 5 C.F.R. § 304.102(b) (defining a "consultant" as "a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience"); 5 C.F.R. § 304.102(c) (defining a "consultant position" as "one that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a Federal official"); 5 C.F.R. § 304.102(d) (defining an "expert" as "a person who is specially qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity."); 5 C.F.R. § 304.102(e) (defining an "expert position" as "one that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary and/or intermittent basis assigned by a Federal official. For example, a microbial contamination specialist may apply new test methods to identify bacteria on products, a computer scientist may adapt advanced methods to develop a complex software system, or a plate maker may engrave a novel design.").

FTC staff reached out to potential consultants or experts based on the needs of the agency and the individuals' publicly known knowledge, experience, education, competence, or skill in that particular area.

**b. Who initiated contact between FTC and the consultant or expert?**

FTC staff identified critical areas where the agency lacked sufficient in-house expertise and reached out to people who had known expertise in these areas. For example, a significant number of the consultants retained are technologists with expertise in artificial intelligence, computing, and related subject areas. This type of expertise enables the agency to better grasp new and emerging technologies and better ensures that our work is keeping pace with new market realities.

**7. Were minority Commissioners involved in or informed of the hiring decisions relating to unpaid consultants and experts?**

Reorganization Plan No. 8 of 1950, 64 Stat. 1264, transferred to the Chair of the FTC “the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission.” Reorganization Plan No. 8 also specifies that “[t]he appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.” Apart from their role in approving the heads of the “major administrative units,” the Commissioners other than the Chair—including the minority Commissioners—are not involved in the agency’s hiring decisions.

**8. Did you or any agency staff under your direction ever request or receive approval for these hires from the FTC General Counsel’s office?**

As noted above in the response to Question 7, Reorganization Plan No. 8 gave the Chair authority to appoint FTC personnel. No “approval” from the General Counsel’s office is required to make an appointment. However, as noted above in the response to Question 2(g), all unpaid consultants and experts are reviewed by the FTC’s Ethics Team, which is part of the Office of the General Counsel, to address federal ethics concerns before onboarding and are provided with written, tailored ethics guidance. In addition, the Office of General Counsel advised on legal issues when requested.

**a. If so, please identify who responded and provide a copy if in writing.**

Not applicable.

**b. If not, why not?**

See the response to Question 8 above.

**9. Did you or anyone at the FTC ever contact the U.S. Office of Government Ethics regarding the agency’s use of unpaid consultants and experts?**

To the best of my knowledge, no FTC employee has contacted the U.S. Office of Government Ethics (OGE) regarding the agency's use of unpaid consultants and experts. The issues examined by the IG—documentation of the unpaid consultants' and experts' scope of work, delineation of roles and restrictions for each position, and standardizing procedures for recruiting and selecting unpaid consultants and experts—are personnel and risk mitigation issues, not issues relating to federal ethics laws, so there is no reason for anyone at the FTC to contact OGE regarding the use of such persons generally. The FTC's unpaid consultants and experts who are appointed under 5 U.S.C. § 3109 are federal employees (or special government employees),<sup>3</sup> so they are subject to the ethics laws. As noted above in the response to Question 1(g), each unpaid consultant or expert was reviewed by the FTC's Ethics Team to address federal ethics concerns before onboarding, and each received ethics training and advice from the FTC's Ethics Team. Based on their positions, the unpaid consultants and experts have filed confidential financial disclosure reports pursuant to OGE regulation, 5 C.F.R. § 2634.904.

**a. If so, please provide copies of all communications.**

Not applicable. See the response to Question 9 above.

**b. If not, why not?**

See the response to Question 9 above.

**10. Were or are you aware that the FTC's own internal handbook bars the use of unpaid consultants and experts to replace employees or perform inherently governmental functions?**

Yes, I was and am aware that the FTC's Administrative Manual includes a section on the "Improper Use of Experts and Consultants"—prohibiting, among other types of work, that "of an ongoing nature more appropriately performed by permanent employees." The Administrative Manual also prohibits experts and consultants from "performing work of a policy and/or decision making or managerial nature, which is the direct responsibility of agency officials."

**a. Why did the FTC ignore its own internal policy and rules?**

The FTC has complied with its Administrative Manual. The Administrative Manual notes that experts and consultants properly may be used to obtain, among other things, the following:

- A. Specialized opinions unavailable in the agency.
- B. Outside points of view, to avoid too limited judgment on administrative or technical issues.
- C. Advice on developments in industry, college, university, and foundation research.

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<sup>3</sup> See 5 C.F.R. § 304.101.

- D. On especially important projects, the opinion of noted experts whose national or international prestige contributes to success of the project.

This is consistent with 5 U.S.C. § 3109 (governing the employment of experts and consultants), the implementing regulations that prohibit an expert or consultant from performing managerial or supervisory work, making final decisions on substantive policies, or otherwise functioning in the agency chain of command, but expressly note that “an expert may act as team leader or director of the specific project for which he/she is hired.”<sup>4</sup> An expert or consultant appointed under 5 U.S.C. § 3109 may be employed without pay, provided the individual agrees in advance in writing to waive any claim for compensation for those services.<sup>5</sup>

The Administrative Manual is also consistent with OMB’s guidance on the performance of inherently governmental and critical functions. OMB has explained that:

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section--including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials--where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor's action. The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function. **For instance, contractors routinely, and properly, exercise discretion in performing functions for the Federal Government when, providing advice, opinions, or recommended actions, emphasizing certain conclusions, and, unless specified in the contract, deciding what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, or how frequently to test.**

(C) A function is not appropriately performed by a contractor where the contractor’s involvement is or would be so extensive, or the contractor’s work product so close to a final agency product, as to effectively preempt the Federal officials' decision-making process, discretion or authority. Such circumstances may be avoided by: (i) carefully delineating in the statement of work the contractor's responsibilities and types of decisions expected to be made in carrying out these responsibilities and (ii) **having Federal employees oversee and, as necessary, give final approval of contractor conduct and decisions.**<sup>6</sup>

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<sup>4</sup> 5 C.F.R. § 304.103(b)(3).

<sup>5</sup> See 5 C.F.R. § 304.102(h); 5 C.F.R. § 304.104(c).

<sup>6</sup> Office of Management and Budget, Office of Federal Procurement Policy, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56237-38 (Sept. 12, 2011) (emphases added).

As reflected in the “Summary of Duties” section in each Form 189, as amended, the unpaid consultants and experts in question were appointed for proper uses. For example, the summaries of duties describe how the individuals will draw upon their technological expertise to advise staff and agency leaders; produce issue memos; help plan informational sessions for staff; support case teams such as by summarizing technical research that is relevant to the case or issue and asking questions directly to engineers at target companies; provide an outside point of view that will help broaden the FTC’s judgment on administrative, economic, and technical issues; advise via written research, memos, document review, and strategic discussions to support the advancement of work product; support FTC staff on cases and enforcement matters; collaborate closely with staff and leadership to provide insights on emerging tech issues and market development trends that could lead to enforcement; provide technical subject matter expertise and technical assistance as a resource to agency staff on markets and technologies; and, as noted experts, bring prestige to the Commission’s work. All of the amended “Summary of Duties” note that the individuals will support policy development with expert technical perspective, but they will not be responsible for the determination of agency policy (i.e., determining the content and application of regulations), do work of an ongoing nature more appropriately performed by the agency’s regular employees, or perform managerial or supervisory work.

In addition, as noted above in the response to Question 2(c), the unpaid consultants and experts reported to managers within the FTC. All FTC managers are federal employees, as defined in 5 C.F.R. § 2641.104, and they provided oversight to ensure that the unpaid consultants’ and experts’ duties did not expand to include performance of inherently governmental functions.

**11. According to the IG report, the FTC assigned 14 unpaid consultants to the agency’s Office of Policy Planning, the division in charge of developing the agency’s approach to antitrust and consumer protection policy—core strategy related to the agency’s law enforcement mission. Why did anyone think this was appropriate, given the prohibition on allowing unpaid consultants to perform inherently governmental functions?**

The IG report indicated that OPP had fourteen people in unpaid positions: nine unpaid consultants or experts, three detailees from other federal agencies, one Presidential Management Fellow, and one person on temporary assignment under the Intergovernmental Personnel Act of 1970. As noted in 16 C.F.R. § 0.8(d), OPP “*assists* the Commission to develop and implement long-range competition and consumer protection policy initiatives” (emphasis added). Under Reorganization Plan No. 8 of 1950, the right to set the agency’s general policies is reserved for the Commission as a body. The unpaid consultants and experts provided advice and opinions, but they did not themselves perform inherently governmental functions. As discussed in the response to Question 10(a), the work performed by the unpaid consultants and experts was consistent with the applicable statutes, regulations, and agency guidance.

**12. Are or were unpaid consultants or experts given access to confidential information?**

Consistent with all applicable rules and procedures, the unpaid consultants or experts were given access to confidential information as necessary to perform their duties.

**a. If so, what types of information did they have access to, and what safeguards were implemented to ensure the proper use and handling of such information?**

As noted above in the response to Question 12, the unpaid consultants or experts were given access to confidential information as necessary to perform their duties. The unpaid consultants and experts are subject to the same safeguards with respect to the proper use and handling of such information as regular FTC employees: they attended new employee orientation, which included a briefing on agency policy regarding the handling of personally identifiable and confidential information; they receive annual security training; they are required to use FTC-furnished computers and mobile devices for all FTC work; and they are subject to agency policy and guidance regarding the handling of personally identifiable and confidential information, including the Administrative Manual sections about safeguarding personally identifiable information, records management, and controlled unclassified information. In addition, each unpaid consultant or expert signed a nondisclosure agreement.

**13. Did the FTC—the agency charged with protecting consumer privacy—follow its own suggested guidelines and best practices in handling unpaid consultants’ and experts’ access to confidential information?**

Yes. See the response to Question 12(a) above.

**14. What record-keeping systems, procedures, or policies have been used to ensure that the unpaid consultants’ and experts’ communications and work product are appropriately preserved under federal law?**

As noted above in the response to Question 12(a), the unpaid consultants or experts are subject to agency policy and guidance regarding the handling of personally identifiable and confidential information, including the Administrative Manual section about records management. In addition, the standard checkout procedure for departing employees—including unpaid consultants or experts—requires them to certify that they have returned nonpublic documents and other official documents that they had in their possession. The nondisclosure agreements that the unpaid consultants or experts signed also require them to return (or destroy, at the agency’s request) all FTC materials and information at the conclusion of their appointment.

**15. Did the FTC’s use of unpaid consultants and experts hinder the agency’s ability to comply with requests made pursuant to the Freedom of Information Act?**

No. Regardless of the creators’ or recipients’ official employment status, records created or received during the course of official government business are subject to FOIA.<sup>7</sup> As noted above in the response to Question 2(c), all of the unpaid consultants and experts were in OPP or BCP. Like every other agency component at the FTC, OPP and BCP have FOIA access officers who

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<sup>7</sup> See 5 U.S.C. § 552(f)(2)(A) (defining the term “record” to include “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format”).



are trained in the FOIA process and help ensure that OPP and BCP personnel respond to FOIA requests.

**16. Does the FTC plan to implement new policies, rules, or procedures governing the use of unpaid consultants and experts going forward?**

As noted in the FTC management response to the OIG report, the FTC's Executive Director, together with staff in the Human Capital Management Office and the Office of General Counsel, and in coordination with the Bureau and Office Directors, will review, update, and finalize Administrative Manual Chapter 3 Section 200 – Employment of Experts and Consultants, which will include documenting unpaid consultants' and experts' scope of work, provide guidance on allowable versus prohibited activities, and more clearly communicate the scope of work with candidates prior to their beginning work at the FTC. In addition, the same group of staff will develop and refine standard operating procedures and guidance for onboarding and managing unpaid consultants and experts and standardizing recruitment and selection.

**a. If so, will these rules be developed and shared publicly?**

The FTC will comply with its obligations regarding public disclosure, including obligations under FOIA.

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If you or your staff have additional questions on these matters, please do not hesitate to contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,



Lina M. Khan  
Chair, Federal Trade Commission