

United States Senate

WASHINGTON, DC 20510-4404

August 18, 2022

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairwoman Khan:

We were alarmed by recent revelations from the Federal Trade Commission’s (“FTC”) Office of the Inspector General (“IG”) that the agency has hired a series of “unpaid consultants” without formal employment contracts, and that the agency lacks any organized policy or procedures to prevent “unpaid consultants’ and experts’ involvement in inherently governmental functions.”¹

The IG report notes that no fewer than 14 unpaid consultants or experts were assigned to the FTC Office of Policy Planning—the agency division that “assists the Commission to develop and implement long-range competition and consumer protection policy initiatives and advises staff on cases raising new or complex policy and legal issues.”² As you’re aware, while the FTC is authorized to contract for temporary services from consultants and experts, federal regulations strictly prohibit the FTC from allowing such contractors “to make final decisions on substantive policies” or “do work performed by the agency’s regular employees.”³

The Federal Acquisition Regulations further clarify that “contracts shall not be used for the performance of inherently governmental functions,” and explicitly state that such functions include “the determination of agency policy, such as determining the content and application of regulations” and “the determination of budget policy, guidance, and strategy.”⁴ In the opinion of the FTC IG, “[t]he 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.”

Accordingly, we ask that you provide answers and information in response to the following questions no later than September 1, 2022. We look forward to discussing this matter with you during oversight hearings before our respective committees.

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/2022-08-01_OIGauditreport_unpaidconsultants_FINAL.pdf

² <https://www.ftc.gov/about-ftc/bureaus-offices/office-policy-planning>

³ 5 C.F.R. § 304.103.

⁴ FAR 7.503(a), (c)(5), (c)(16).

1. Please identify every unpaid consultant or expert, broadly construed, that has been retained by the FTC since January 1, 2021.
2. For each person identified in response to Question (1):
 - a. Provide a copy of the person's current resume or CV.
 - 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.
 - c. Identify each FTC component in which the person worked and who they report or reported to.
 - d. Describe the services rendered and functions performed in each component by the person.
 - 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.
 - f. Identify who reviewed and approved the consultant's or expert's application.
 - g. Indicate whether or not the person received ethics training.
3. How often were you updated and informed of the unpaid consultants or experts work?
4. Since you took over leadership of the agency, how has it defined "consultant" and "expert"?
 - a. What criteria were used to recruit the unpaid consultants and experts?
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?
6. For any position that was not publicly noticed, please answer:
 - a. How did the consultant or expert learn of the opening?
 - b. Who initiated contact between FTC and the consultant or expert?

7. Were minority Commissioners involved in or informed of the hiring decisions relating to unpaid consultants and experts?
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?
 - a. If so, please identify who responded and provide a copy if in writing.
 - b. If not, why not?
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?
 - a. If so, please provide copies of all communications.
 - b. If not, why not?
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?
 - a. Why did the FTC ignore its own internal policy and rules?
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?
12. Are or were unpaid consultants or experts given access to confidential information?
 - 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?
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?
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?

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?

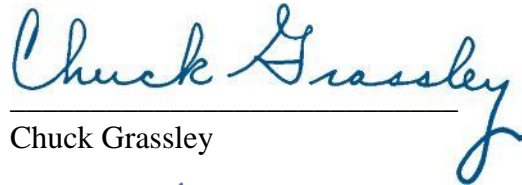
16. Does the FTC plan to implement new policies, rules, or procedures governing the use of unpaid consultants and experts going forward?

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

Sincerely,



Mike Lee



Chuck Grassley



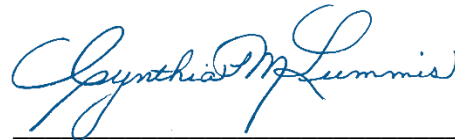
Marsha Blackburn



Thom Tillis



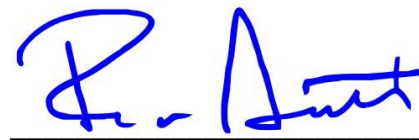
Tom Cotton



Cynthia Lummis



Ted Cruz



Rick Scott