



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Office of the General Counsel

August 31, 2022

MEMORANDUM

TO: Christine S. Wilson
Commissioner

FROM: Lorielle L. Pankey
Designated Agency Ethics Official

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PANKEY

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LORIELLE PANKEY
Date: 2022.08.31 21:17:25
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SUBJECT: Federal Ethics Response to Meta Petition for Chair Khan's Recusal

This memorandum addresses federal ethics issues raised by the petition filed by Meta Platforms, Inc. ("Meta")¹ calling for Chair Lina M. Khan's recusal from the FTC's review of Meta's proposed merger with Within Unlimited, Inc. ("Within"). The Commission has exercised its discretion to treat Meta's petition as properly filed and Meta's petition is now under the Chair's consideration. For the reasons discussed below, I recommend Chair Khan elect to recuse from participating in Meta/Within as adjudicator to avoid an appearance of partiality even though I do not find her participation would constitute a *per se* federal ethics violation.

The primary arguments made by Meta are focused on prejudgement and due process concerns. I continue to defer to the FTC's Deputy General Counsel for Legal Counsel and my other colleagues in the Office of the General Counsel to provide guidance on such issues.² From a federal ethics perspective, I have strong reservations with Chair Khan participating as an adjudicator in this proceeding where – fairly recently, before joining the Commission – she repeatedly called for the FTC to block *any* future acquisition by Facebook. In my view, such statements would raise a question in the mind of a reasonable person about Chair Khan's impartiality as an adjudicator in the Commission's Meta/Within merger review. Accordingly, I recommend Chair Khan recuse to avoid an appearance of partiality concern pursuant to 5 C.F.R. § 2635.502.

¹ Meta was previously known as Facebook, Inc. ("Facebook").

² Legal ethics, administrative law, and related concerns are beyond the purview and expertise of the FTC's Designated Agency Ethics Official. However, it is worth noting that the Commission previously indicated the federal judicial recusal standard, 28 U.S.C. § 455, is the relevant standard to apply in a Part 3 proceeding when addressing the appearance of bias on due process grounds. See *Intel Corp., Docket No. 9341, Opinion and Order of the Commission Denying Motion for Disqualification (Public Version)*, at p. 5 (Dec. 18, 2009).

My recommendation notwithstanding, a decision by Chair Khan to participate in this matter as adjudicator is not a *per se* federal ethics violation. Given the nature of the appearance concern at issue, Chair Khan may exercise her discretion to conclude there is no reasonable basis to question her impartiality in this matter. Should Chair Khan decide to participate, Meta's petition must be reviewed by the Commission. Whether the Chair should participate as an adjudicator in this proceeding may later be reviewed by a federal court. Ultimately, regardless of what conclusions are made and by whom, my inquiry must focus on upholding the integrity of FTC programs, operations, and decisions. Maintaining public confidence in the FTC's integrity is my sole focus as the agency's career Designated Agency Ethics Official.

Background:

(1) Procedural History

On July 25, 2022, Meta petitioned for Chair Khan's recusal "from participating in any decisions concerning the FTC's review of Meta's proposed merger with Within Unlimited, Inc. ('Within'), including any upcoming agency action or vote related to the merger."³ Meta's July 2022 Petition expressly incorporates the same statements allegedly made by Chair Khan before joining the Commission and the same legal arguments raised by the company in its July 2021 Petition to recuse Chair Khan from a different FTC antitrust matter.⁴ To properly consider Meta's July 2022 Petition, one must understand what happened in the past year.

Pursuant to Commission Rule of Practice 16 C.F.R. § 4.17, the FTC's Office of the Secretary rejected Facebook's July 2021 Petition as improperly filed since no administrative proceeding was pending before the Commission. The Commission later filed an amended complaint against Facebook in federal district court, alleging monopolization in the social networking market. *See Fed. Trade Comm'n v. Facebook, Inc.*, No. CV 20-3590 (JEB), 2022 WL 103308, (D.D.C. Jan. 11, 2022). Facebook moved to dismiss the amended complaint and again challenged Chair's Khan decision to participate.

The district court denied the motion to dismiss and resolved the recusal question in favor of the Commission. The district court concluded that when voting in favor of filing a federal court complaint against Facebook, the Chair was acting as a prosecutor. After determining due process standards applicable to adjudicators and those applicable to final decisionmakers in rulemaking proceedings did not apply when voting to issue a complaint in federal court, the district court applied the due process standards applicable to prosecutors. Finally, the district court held that none of the statements Facebook attributed to the Chair required her to recuse from her service as prosecutor on due process or federal ethics grounds.⁵

³ *In re Petition for Recusal of Chair Lina M. Khan from Involvement in the Proposed Merger between Meta Platforms, Inc. and Within Unlimited, Inc.* (July 25, 2022) ("July 2022 Petition").

⁴ *See In Re Petition for Recusal of Chair Lina M. Khan from Involvement in the Pending Antitrust Case Against Facebook, Inc* at 1 (July 14, 2021) ("July 2021 Petition"), attached as Ex. A to July 2022 Petition.

⁵ *Id.* at *19-21.

Meta expressly acknowledges it failed to convince the district court to require Chair Khan's recusal when serving in a prosecutorial role.⁶ Accordingly, the primary focus of Meta's July 2022 petition is whether Chair Khan must recuse when serving as adjudicator in the FTC's Meta/Within merger review. To be clear, Meta also expressly challenges Chair Khan's participation in the vote to issue an administrative complaint.⁷ Considering the district court opinion, Meta appears to argue the vote to issue an administrative complaint is adjudicatory. It is not necessary to resolve that question in light of the Commission's vote to issue a Part 3 complaint.⁸ Now that the matter is in adjudication and before the Chair under 16 C.F.R. § 4.17, the key question is whether Chair Khan is required to recuse from any further participation in this adjudicatory proceeding.

(2) Prior Statements about Facebook Acquisitions

Before being appointed to the Commission, Chair Khan spoke and wrote extensively about Facebook and competition law.⁹ The most relevant statements appear below in bold, with context helpfully identified and summarized by my colleagues in the Office of the General Counsel:

On November 1, 2017, while serving as Director of Legal Policy for the Open Markets Institute ("OMI"), Chair Khan signed a letter to then Acting FTC Chair Ohlhausen stating that "[r]ecent events reveal that Facebook has become too big and complex for any executive team to manage responsibly, and has provided a back-door through which America's enemies can attack our vital social and democratic institutions."¹⁰ The letter further states that "[t]he most obvious immediate step to address Facebook's current power is to prohibit mergers between Facebook other potentially competitive social networks or other new and promising products and services. In other words, until the American people, working through our government, determine how to ensure that Facebook's power does not harm our nation's security, democratic institutions, or the

⁶ July 2022 Petition at 3.

⁷ To the extent Meta intends to relitigate whether the Chair's statements require her to recuse from participating in a prosecutorial function, both the district court and the FTC's Designated Agency Ethics Official have already addressed that concern. See Attachment 1: *Federal Ethics Response to Petitions for Chair Khan's Recusal* at p.1 (July 26, 2021) (concluding, "the Amazon and Facebook petitions are not meritorious at least to the extent they seek to recuse Chair Khan on federal ethics grounds from participating as a prosecutor/investigator in FTC antitrust matters concerning Amazon and/or Facebook.").

⁸ The Commission voted to issue an administrative complaint in Meta/Within on August 11, 2022. It is rather futile to split hairs about whether a vote to issue an administrative complaint is a prosecutorial vs. an adjudicatory function. To protect the integrity of Commission decisions, if an employee should recuse from the subsequent administrative adjudication, the prudent course is to also recuse from participating in the vote authorizing the administrative adjudication.

⁹ See e.g., Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1002 (2019).

¹⁰ Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions> (accessed Aug. 2, 2022).

political rights and commercial freedoms of individual citizens, **Facebook should not be able to amass any greater power through acquisition.**¹¹

On March 22, 2018, in an op-ed published in The Guardian and a related press release on OMI's website, the Executive Directors of OMI called on the FTC to "prohibit all future acquisitions by Facebook for at least five years."¹² [Although she served as OMI's Director of Legal Policy at that time, Chair Khan's name does not appear in this op-ed or the OMI press release.]

On May 15, 2018, in a video interview with Bernie Sanders, the Chair, speaking as OMI's Director of Legal Policy, said, in response to the statement by another speaker of the need to break Facebook's power: **"I think that's exactly right. I think one of the first steps is to make sure Facebook is not acquiring further power. So, if Facebook tomorrow announces that it's acquiring another company, I would hope the FTC would look at that very closely and block it. Making sure that it's not just out there expanding its power is really important. It's also important that we have a system of outside checks so it's not just Zuckerberg seeing who sees what information."**¹³

In addition to the statements above, the Chair has also stated in her academic writing that Facebook "blocks apps that it deemed competitive threats . . . [and] systematically copied them" and that Facebook used its informational advantage to "thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors."¹⁴

Finally, while counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, the Chair had a leading role in authoring an October 2020 report summarizing the Committee's investigation into digital markets.¹⁵ The report concluded that "Facebook has monopoly power in the market for social networks... [which is] firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms."¹⁶ The report described the Oculus virtual

¹¹ *Id.*

¹² Press Release, Open Markets Inst., *Fines for Facebook Aren't Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy* (Mar. 22, 2018), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy> (accessed Aug. 2, 2022).

¹³ The Bernie Sanders Show: *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10h1HI> (accessed Aug. 2, 2022).

¹⁴ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1002-3.

¹⁵ Lina Khan C.V. (archival version), <https://web.archive.org/web/20210628071354/http://www.linamkhan.com/bio-1> (accessed Aug. 4, 2022).

¹⁶ Majority Staff of H. Subcomm. On Antitrust, Commercial, and Admin. Law of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets* at 6 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (accessed on Aug. 4, 2022).

reality headset as one of Facebook’s five primary product offerings, and noted that Facebook had acquired “several virtual reality and hardware companies, such as Oculus . . . [and] Oculus game developers.”¹⁷ The report added that Facebook and other tech companies “have recently focused on acquiring startups in the artificial intelligence and virtual reality spaces,” and that in these spaces, “the dominant firms of today could position themselves to control the technology of tomorrow.”¹⁸

Office of the General Counsel Memorandum, “Meta Petition to Recuse Chair Khan” at p. 3-4 (August 10, 2022) (emphasis added).

Discussion:

(1) Chair Khan is required to recuse from participating as an adjudicator in Meta/Within if she determines a reasonable person would question her impartiality. Otherwise, Chair Khan is not required to recuse on federal ethics grounds and her participation would not be a *per se* federal ethics violation.

Federal employees are required to ensure their conduct upholds public trust in federal decisions, programs, and operations. More specifically, federal employees must be, *as well as appear to be*, impartial in the course of performing their official duties:

- Employees shall act impartially and not give preferential treatment to any private organization or individual; and
- Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

5 C.F.R. §§ 2635.101(b)(8), (14).

The Standards of Ethical Conduct for Employees of the Executive Branch (“Standards of Conduct”) attempt to balance protecting the integrity of Government operations with the important aim of achieving mission success through optimal use of uniquely qualified, highly skilled personnel. An employee “should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.” 5 C.F.R. § 2635.501(a). The use of the term “covered relationship” in the Standards of Conduct “pinpoint[s] certain relationships that are especially likely to raise issues of lack of impartiality [and] helps to focus the employee’s inquiry.” 57 Fed. Reg. 35006,

¹⁷ *Id.* at 124.

¹⁸ *Id.* at 327.

35025 (August 7, 1992) (preamble to final rule). Federal employees have a “covered relationship” with:

- (i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;
- (ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;
- (iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
- (iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
- (v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant.

5 C.F.R. § 2635.502(b)(1)(i)-(v).

The Standards of Conduct also contain a regulatory catch-all provision: “[a]n employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.” *Id.* § 2635.501(a); *see also id.* § 2635.502(a)(2) (reiterating that “[a]n employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.”). Accordingly, the U.S. Office of Government Ethics (OGE) recognizes that certain situations, even if not prohibited by law, are likely to raise a question in the mind of a reasonable person about an employee’s impartiality. *Id.* §§ 2635.502(a)-(b).

Notably, none of the situations OGE expressly identifies in its regulations are at issue here. No one has alleged the Chair has a “covered relationship” with a party or party representative in this proceeding. Further, no one has alleged this proceeding would affect the financial interests of a member of the Chair’s household. Meta’s petition therefore must be considered within the scope of OGE’s regulatory catch-all provision concerning “other circumstances,” as set out in §§ 2635.501(a) and 2635.502(a)(2) that may give rise to an appearance concern.

OGE regulations require employees to first evaluate for themselves whether appearance concerns warrant their recusal from specific party matters. However, the Standards of Conduct provide that the agency designee may independently determine whether an employee must recuse due to certain appearance of partiality concerns.¹⁹ *Id.* § 2635.502(c); *see also id.* §

¹⁹ Perhaps the Standards of Conduct included this provision recognizing that affected employees are not always best suited to discern their own appearance concerns and to ensure consistency in federal ethics decisions made within agencies and across the Executive Branch. Some agencies have addressed this issue by removing the affected employee’s perspective from the analysis altogether via supplemental federal ethics regulations. *See e.g.*, 5 C.F.R. §§ 9401.108-111.

2638.104(c)(6) (the Designated Agency Ethics Official is responsible for, among other things, “[t]aking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means.”). Further, the Standards of Conduct state:

If the agency designee determines that the employee’s impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee’s participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

Id. § 2635.502(c)(1).

Unless he receives an authorization to participate from the agency designee, “an employee *shall not* participate” in a specific party matter if the agency designee determines “that the financial interest of a member of the employee’s household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality.” *Id.* § 2635.502(e) (emphasis added). As stated above, Meta’s July 2022 Petition does not allege partiality concerns based on the financial interests of a member of Chair Khan’s household or the Chair’s covered relationships. The provisions in Section 2635.502(e) and (c) (quoted above) do not reference the regulatory catch-all language found in 5 C.F.R. §§ 2635.501(a) or 2635.502(a)(2) when referring to the agency designee’s authority to make independent determinations regarding appearance concerns and recusal requirements.²⁰ Thus, recusal is not legally required under these circumstances. Any decision by the Chair to participate in this matter as an adjudicator is not a *per se* federal ethics violation.

(2) Several of Chair Khan’s statements—made within the past five years, less than three years before her Commission appointment—create an appearance of bias sufficient for the FTC’s Designated Agency Ethics Official to recommend Chair Khan recuse from participating as an adjudicator in Meta/Within. Nonetheless, Chair Khan may disagree and decide to participate.

Evidence of actual bias is not the standard from a federal ethics perspective. The standard is whether it is reasonable to conclude the employee appears biased. *See id.* § 2635.101(b)(14); *see also* §2635.501-502. Chair Khan should recuse from serving as an adjudicator from Meta/Within if her prior statements about Facebook would raise a question in the mind of a reasonable person about her impartiality.

Although the Chair may reach a different conclusion, it is appropriate to explain why I think a reasonable person would question her impartiality when serving as an adjudicator in Meta/Within. *Id.* §§ 2635.502; 2638.104(c)(6). As Designated Agency Ethics Official, I am frequently required to provide guidance in gray areas, including when an appearance concern

²⁰ This does not appear to be an oversight as OGE regulations addressing the scope of the agency designee’s authority repeat (twice) all other key components of the appearance of partiality analysis. *Id.* §§ 2635.502(c), (e).

arises within the scope of the regulatory catch-all provision of the Standards of Conduct. These issues are rarely litigated and OGE has indicated it will not make these judgement calls for agencies.²¹ I strive to provide consistent advice to all FTC employees, taking care to evaluate situations at hand on a case-by-case basis. This careful approach is critical not only to ensure the overall integrity of FTC operations but to make clear to both the public and all FTC employees that everyone will receive the same federal ethics guidance, regardless of their political leanings, rank, or their passionate opinions about how particular matters pending at the FTC should be resolved. To the best of my knowledge, no FTC employee has participated in a specific party matter when the agency designee has recommended recusal on appearance or other federal ethics grounds. That said, to the best of my knowledge, the participation of an FTC employee has not been challenged on grounds like the allegations Meta and Amazon have made against Chair Khan.²²

The statements that, in my view, would raise appearance of partiality concerns in the mind of a reasonable person if Chair Khan serves as an adjudicator in this merger review stem from her repeated calls for the FTC to block all future acquisitions by Facebook. Some may argue that Chair Khan's statements about Facebook in bold text above do not raise a question in the mind of a reasonable person about her impartiality as adjudicator in this proceeding. I disagree. Where Chair Khan has fairly recently called for the FTC to block any and all acquisitions by Facebook, there is support for a reasonable, disinterested person to question whether the Chair would be impartial in a Commission adjudication of a merger by that same company. From a federal ethics standpoint, recusal should follow solely based on appearances.

As stated in my response to Facebook's July 2021 Petition,²³ Meta refers to a variety of public statements made by Chair Khan, prior to her current appointment to demonstrate "other circumstances" are present that warrant her recusal from this matter due to an appearance of partiality. The heart of Meta's argument is that Chair Khan launched her career in large part by making numerous public statements about the legality of Facebook's business practices. Meta attempts to distinguish her remarks from other statements often made by other senior officials prior to entering federal service by alleging Chair Khan repeatedly made conclusory statements specifically about the legality of its business practices as opposed to opining on competition issues more generally.

The existence of Chair Khan's public comments concerning Facebook prior to her FTC appointment is not in dispute. Even assuming without deciding Facebook's characterizations of

²¹ OGE is reluctant to serve as the final decisionmaker as to whether a reasonable person would question the impartiality of an employee's participation in an agency particular matter. See OGE Advisory 00 x 4 (April 11, 2000) ("Ultimately, an employee and the agency ethics official are considered the best arbiters of whether the circumstances of an individual case warrant recusal under section 2635.502.").

²² Amazon has petitioned for Chair Khan's recusal on similar grounds. *In Re Motion to Recuse Chair Lina M. Khan From Involvement in Certain Antitrust Matters Involving Amazon.com, Inc.* (June 30, 2021); *Petition of Reconsideration of Recusal Petition By Amazon.com, Inc.* (July 15, 2021).

²³ See Attachment 1: *Federal Ethics Response to Petitions for Chair Khan's Recusal* at p.5 (July 26, 2021).

her public statements as described in its July 2021 and July 2022 Petitions are accurate,²⁴ the question remains whether such commentary warrants Chair Khan's recusal from serving as an adjudicator in Meta/Within. Notably, Chair Khan will presumably become privy to non-public information in the course of this proceeding that may alter her alleged prior views. Meta stating this would be impossible for Chair Khan to do impartially does not make it so.

Nonetheless, the question is not whether the Chair will serve impartially but whether she appears to be impartial from the perspective of a reasonable person with knowledge of the relevant facts. In my view, the statements in bold text above attributed to Chair Khan on their face raise an appearance concern in the mind of a reasonable person where Chair Khan would be serving as an adjudicator in the Commission's review of an acquisition by that same company.²⁵ I do not reach this conclusion lightly and have already expressed my view—specifically, as applied to Chair Khan, Facebook, and Amazon—that rarely should employees' statements made prior to their federal appointments trigger recusal on catch-all appearance grounds.²⁶

Where the statements concern a specific company (Meta, formerly known as Facebook) and a particular outcome at this agency (calling for the FTC to block any acquisition Facebook seeks), it is difficult to conclude there is no reasonable appearance concern with Chair Khan serving as an adjudicator in the Commission's merger review of Meta/Within. In contrast, there likely would be no reasonable basis to question her impartiality if the statements were made long ago or if Meta's business practices had changed dramatically since the statements were made. Such drastically changed circumstances would likely make the opinions the Chair expressed previously largely irrelevant or at least woefully outdated and worthy of revisiting in the mind of a reasonable person. For example, if the Chair's statements had been made a decade or more ago or if Meta had already broken apart into a smaller company, the Chair's prior calls for the FTC to block any Facebook acquisition would no longer appear particularly relevant to the matter now before the Commission.

All of the statements above tied to the Chair were made within the past 5 years and since the statements were made Meta has only continued to grow.²⁷ Although Facebook recently

²⁴ I have focused on the excerpts cited above, which were also used by my OGC colleagues in their memorandum to you about due process.

²⁵ This memorandum focuses on Chair Khan's role as adjudicator because that is nature of her participation in this proceeding. In my view, someone may reasonably question Chair Khan's ability to serve as a prosecutor in Meta/Within. However, that is irrelevant to this proceeding. Moreover, I have already independently issued a 5 C.F.R. § 502(d) authorization for Chair Khan to participate as an investigator/prosecutor in FTC antitrust matters affecting Meta (and Amazon). Attachment 1: *Federal Ethics Response to Petitions for Chair Khan's Recusal* (July 26, 2021). No one has brought information to my attention that warrants revoking that authorization. Accordingly, my prior Section 502(d) authorization for Chair Khan to participate as prosecutor/investigator remains in place.

²⁶ Generally speaking, such an approach would be impossible to implement, easily subject to manipulation, and likely disqualify large swaths of senior officials with relevant experience from serving the United States. *See id.* at p.6-7.

²⁷ I do not intend to suggest that five years is the litmus test. I point that timeframe out as a reference point since her former employer, OMI, while Chair Khan worked there, advocated for a block of all Facebook acquisitions for at least the next five years.

rebranded itself as Meta, the parent company (Facebook) was simply renamed—none of Facebook’s underlying companies changed in connection with the rebranding.²⁸ Notably, when Meta changed its ticker symbol months later in connection with the rebranding, OGE advised there was no reportable transaction for senior officials who previously held Facebook (FB) stock because in practice they continued to hold the same interest in the same company (*i.e.*, the same conflicts applied as before, there was simply a change in name; stockholders did not acquire an interest in a new or different company).

Further, it appears that Meta’s largest acquisitions—including, purchasing the popular virtual reality platform Oculus— took place prior to the statements tied to Chair Khan above.²⁹ Thus, Facebook’s entry into this space was already a point of concern when the statements were made. Within is also a virtual reality company. Whether Meta owning Oculus is relevant to the Commission’s Meta/Within review is a question for our staff in the Bureau of Competition and the Bureau of Economics to answer. In any event, since the statements tied to Chair Khan were made fairly recently, after Facebook entered into the virtual reality space, and Meta has subsequently continued to grow via acquisitions, it is reasonable for a disinterested person to question her impartiality when serving as an adjudicator in the Commission’s review of Meta/Within.³⁰

(3) The Designated Agency Ethics Official has not issued an authorization for Chair Khan to participate as an adjudicator in Meta/Within. An ethics authorization is not required for Chair Khan’s participation unless she determines a reasonable person would question her impartiality.

Even if a reasonable person would question an employee’s ability to be impartial, the employee may receive an ethics authorization³¹ to participate if the Designated Agency Ethics Official determines the interests of the United States in the employee’s participation outweighs the appearance concern. 5 C.F.R. § 2635.502(d). For the reasons discussed further below, in my view, the Government’s need for Chair Khan to participate in this proceeding does not outweigh the appearance concern. Accordingly, I did not issue a Section 502(d) authorization for the Chair to participate as an adjudicator in Meta/Within.

²⁸ See “The Facebook Rebrand: What is Meta?” by Aleksander Hougan, last updated Feb. 15, 2022 at <https://www.cloudwards.net/facebook-rebrand/#:~:text=Key%20Takeaways%3A,be%20affected%20by%20the%20rebranding> (accessed Aug. 29, 2022).

²⁹ See “Facebook Acquisitions – The Complete List (2022)!” by Shruti Bose (Feb. 17, 2022) at <https://www.techwyse.com/blog/infographics/facebook-acquisitions-infographic/> (accessed Aug. 29, 2022).

³⁰ I do not recommend that Chair Khan recuse from all future Commission adjudications involving Meta. For example, nothing in Meta’s petition leads me to believe I would make this same recommendation if this were a privacy, false advertising, or other consumer protection litigation matter.

³¹ For purposes of this discussion the terms “waiver” and “authorization” are interchangeable. Technically, an employee may receive an authorization from the Designated Agency Ethics Official, under 5 C.F.R. § 2635.502(d), to participate despite someone reasonably questioning the employee’s impartiality. In practice, a Section 502(d) ethics authorization to participate operates and is often referred to by laypersons as an ethics waiver.

As a threshold concern, no employee is entitled to a federal ethics waiver. Some agencies never issue federal ethics waivers and, according to OGE, many others rarely issue waivers and more often require recusal, divestiture, or even resignation to address conflicts. Nonetheless, OGE recognizes situations may infrequently arise where an actual conflict or the appearance of conflict is outweighed by the need for the United States to act in a particular matter. OGE has developed waiver processes, with agency designees always playing an essential role, to address those rare occasions. *Id.* § 2638.104(c)(6); OGE Advisory DO-10-005 at p. 5 (April 22, 2010) (“Evaluating possible waivers is one of the more significant duties that ethics officials perform to ensure public confidence in the Government’s operations and programs. Both the individual employee’s interests and those of the Government are best served when this process is carried out in a careful and consistent manner.”). The specific procedures to obtain and execute a federal ethics waiver vary depending on the nature of the conflict, but in all circumstances “waiver processes permit a review of facts presented in a specific situation, and authorize someone other than the affected employee to make a reasoned determination as to whether a waiver is warranted.” OGE Advisory DO-10-005 at p. 3.

OGE has unequivocally advised retroactive federal ethics waivers are invalid. *Id.* Since Chair Khan has already participated in the Commission vote to issue an administrative complaint, one may argue that Chair Khan is unable to now obtain an authorization to participate as an adjudicator in this proceeding. However, voting to issue an administrative complaint is arguably a prosecutorial function. Regardless, your request for my written analysis about the Chair’s participation as an adjudicator in this matter is not when I first considered the issue. After careful consideration, prior to the Commission vote to authorize an administrative complaint, I decided not to provide an authorization under 5 C.F.R. § 2635.502(d) for Chair Khan to participate as an adjudicator in Meta/Within. More specifically, after determining there was a reasonable basis to question Chair Khan’s impartiality when serving as an adjudicator in Meta/Within, I also considered whether her participation should nonetheless be authorized. Upon examining the relevant facts in the context of Chair Khan serving as an adjudicator in this particular merger review, I did not provide an authorization for the Chair to participate.

Chair Khan may participate as an adjudicator in Meta/Within, despite any partiality concerns, if the agency designee authorizes the participation in accordance with the Standards of Conduct. 5 C.F.R. § 2635.502(d). The agency designee may authorize participation if, based on the relevant circumstances, the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations. *Id.* Factors to be considered include:

1. the nature of the relationship involved;
2. the effect that resolution of the matter would have on the financial interest of the person involved in the relationship;
3. the nature and importance of the employee’s role in the matter;
4. the sensitivity of the matter;
5. the difficulty of reassigning the matter to another employee; and
6. adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

Id. Considering these factors, I concluded that the United States' interest in Chair Khan's participation does not outweigh the concern that a reasonable person might question her ability to be impartial.

Factors 1-2 favor Chair Khan's participation as there is no financial interest, "covered relationship" or other personal or business affiliation at issue. Factors 3-4 initially appear to cut in both directions. As Chair, Ms. Khan's role in any FTC specific party matter is important and the antitrust concerns at issue are critical to the U.S. economy. It is critically important that Chair Khan is empowered to fulfill her official duties while also complying with both the letter and the spirit of federal ethics requirements. Competition matters that come before the Commission often raise cutting-edge questions of antitrust, intellectual property, and other law. The resolution of Meta/Within is likely to have major effects on the marketplace, even beyond the two parties to the proposed merger. As agency head, it directly serves the public interest that the FTC have the benefit of Chair Khan's participation in matters before the Commission that raise significant competition policy questions.

However, since the Chair would be serving as an adjudicator in this high-profile FTC litigation matter, the scale for factors 3-4 is tipped in favor of recusal. All employees must act (and appear to act) impartially, but an employee's role in a proceeding warrants careful consideration when deciding whether to grant a waiver. When a federal employee serves as an adjudicator in a specific party matter, due process requires a strict standard when evaluating appearance of bias concerns.³² As noted above, *supra* n. 2, the Commission previously indicated the federal judicial recusal standard (28 U.S.C. § 455) is the relevant standard to apply in a Part 3 proceeding when addressing the appearance of bias on due process grounds. Section 455 provides in relevant part "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* § 455(a). When considering whether to issue an ethics authorization under 5 C.F.R. § 2635.502(d), I see no reason to deviate from the Commission's prior approach absent an extraordinary circumstance.³³ Thus, the Chair's role of adjudicator in this litigation matter makes a federal ethics waiver harder to justify when a reasonable person may question her impartiality. Further, the high-profile, sensitive nature of this proceeding warrants taking all reasonable steps, including electing to recuse, to preserve the integrity of any decisions the Commission makes in this matter.

Factor 5 also favors recusal. The Commission is certainly able to function regardless of whether a Commissioner recuses from a matter. To be clear, Chair Khan's recusal would deprive the Commission of one of its Presidentially-appointed decision makers. Her voice would be wholly removed, the Commission would not be able to benefit from her expertise and judgment as Chair. Given Chair Khan's antitrust professional experience and scholarship, she is

³² Employees working as an adjudicator *in a rulemaking proceeding* or serving as a prosecutor/investigator in a litigation matter have comparatively less strict standards.

³³ *Intel Corp., Docket No. 9341, Opinion and Order of the Commission Denying Motion for Disqualification (Public Version)*, at p. 5, n.10 (Dec. 18, 2009) ("The federal statute arguably raises the bar higher by requiring recusal unless the parties' consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one's participation in certain circumstances.")

uniquely qualified to participate in broad policy as well as FTC particular matters that concern competition. However, Commissioners (including an agency head) have recused from various FTC particular matters in the past when federal ethics or other legal requirements supported recusal. The Commission is able to review this proposed merger with or without the participation of a single Commissioner. Factor 6 is largely moot for a Chair (and other Commissioners); Chair Khan either fully participates or she recuses.

Only Factors 1-2 favor Chair Khan receiving an authorization to participate as adjudicator in Meta/Within (*i.e.*, there is no financial interest, “covered relationship” or other personal or business affiliation at issue). While section 2635.502(d) states that the “[f]actors which *may* be taken into consideration *include*” the six factors discussed above, those are not the only factors that the agency designee may consider when determining whether to issue an authorization (emphasis added). For the reasons expressed above, the spirit of the catch-all provision squarely favors recusal here. Regardless, since only two of the above six factors support issuing an authorization, I decided not to provide such an authorization to Chair Khan under these specific circumstances.

There is one sentiment stated above worth repeating—if Chair Khan decides to participate as adjudicator in Meta/Within, there is no *per se* violation of federal ethics requirements. OGE leaves the resolution of appearance concerns that fall within the scope of the Standards of Conduct’s catch-all provision to the discretion of the affected employee.³⁴ OGE emphasized the importance of the affected employee’s perspective by advising that:

[I]f an employee believes that a personal friendship, or a professional, social, political or other association not specifically treated as a covered relationship, may raise an appearance question, then the employee should use the section 2635.502 process to resolve the question. If the employee does use this process and does make a commitment to recuse, then that commitment is binding and must be observed.

[OGE Advisory 99 x 8](#) at p.2 (April 26, 1999).

Accordingly, unless Chair Khan, herself, determines that her impartiality may reasonably be questioned, Chair Khan is not required to recuse from participating as adjudicator in this proceeding on federal ethics grounds. Moreover, notwithstanding the FTC’s Designated Agency Ethics Official’s recommendation to recuse and decision not to provide a section 2635.502(d) authorization, any choice Chair Khan makes to participate in Meta/Within as adjudicator is not *per se* evidence of a federal ethics violation.

Conclusion:

Federal employees must avoid any actions creating the appearance they are violating law or ethical standards. Whether there is a reasonable appearance concern or an interest of the

³⁴ “OGE has consistently maintained that, although employees are encouraged to use the process provided by section 2635.502(a)(2), “[t]he election not to use that process cannot appropriately be considered to be an ethical lapse.” [OGE Advisory 01 x 8](#) at p.3 (Aug. 23, 2001) (citations omitted).

United States that overrides such a concern must be considered on a case-by-case basis. I have not been asked to provide Chair Khan an authorization to participate as an adjudicator in Meta/Within, and she is not required to obtain an authorization from me to participate unless she herself concludes a reasonable person with knowledge of the relevant facts may question her impartiality to serve as an adjudicator in this proceeding.

As communicated during the nomination process, I recommend Chair Khan seek guidance from the FTC's Designated Agency Ethics Official and others in the Office of the General Counsel, as appropriate, before participating in any FTC matter where someone may reasonably question her ability to work on any FTC particular matter. I am unaware of any action Chair Khan has taken since her appointment that amounts to a *per se* federal ethics violation, and I do not believe her participation as an adjudicator in Meta/Within would constitute a *per se* federal ethics violation. In my opinion, there is a reasonable appearance concern with her participation in this matter as an adjudicator. I also recognize that reasonable minds may disagree. For the reasons discussed above, I recommend Chair Khan elect to recuse from participating as an adjudicator in this proceeding.