

TECH FREEDOM

Comments of

TechFreedom

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In the Matter of

Draft FTC Strategic Plan for FY2022-2026

Docket (FTC-2021-0061)

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I. Background

TechFreedom files these comments in response to the Federal Trade Commission's (FTC) request for comment on the Draft FTC Strategic Plan for Fiscal Years 2022 to 2026 (Draft Strategic Plan). On November 12, 2021, the FTC released the Draft Strategic Plan and invited public comment.² In these comments, TechFreedom opposes the agency's proposed change to the FTC's mission and criticizes the deletion of a key balancing factor in the FTC's overall analysis of antitrust law.

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

We have weighed in on significant issues over which the FTC has jurisdiction over the past decade:

- We championed a reasoned discussion of COPPA enforcement that does not destroy the creative community or tech industry.³
- We urged caution in rescinding prior FTC Policy Statements without thorough examination and something to fill the void.⁴

² *FTC Invites Public Comment on Draft Strategic Plan*, FTC (Nov. 12, 2021), <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-invites-public-comment-draft-strategic-plan>.

³ We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC's settlement with YouTube. *See Will Kids' Privacy Crackdown Break the Internet? Watch the 1/13 event*, TECHFREEDOM (Jan. 13, 2020), <https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/>. We also hosted a Capitol Hill panel discussion on COPPA in 2011, *see* TECHFREEDOM, <https://techfreedom.org/reminder-techfreedomfosi-coppa-event-in-dc/> (last visited Nov. 23, 2021), and appeared at the FTC's workshop on COPPA. *See* Press Release, Federal Trade Commission, *The Future of the COPPA Rule: An FTC Workshop* (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule), <https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop>. *See also* TechFreedom, *Comments on COPPA Rule Review*, Project No. P195404, Docket ID: FTC-2019-0054 (Dec. 11, 2019), <https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf>.

⁴ *See* Letter from TechFreedom to Chair Lina Kahn regarding Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement (June 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-Investigations.pdf>.

- We analyzed the pros and cons of the FTC and DOJ’s 2020 Vertical Merger Guidelines.⁵
- We challenged the notion that the FTC Act requires plaintiffs to utilize the FTC’s in-house adjudicatory process for constitutional claims against the agency.⁶
- We encouraged the Supreme Court to limit the FTC’s remedy powers to those that are explicitly granted by the FTC Act.⁷
- We challenged the FTC’s authority to issue binding rules on non-compete and exclusive contract terms.⁸
- We analyzed the law and impact of non-compete agreements in the tech sector and warned that insufficient study has been done to merit a rulemaking proceeding.⁹
- We responded to, and critiqued, a petition for rulemaking calling to ban exclusive agreements.¹⁰

We welcome the opportunity to comment on the FTC’s Strategic Plan and overall mission.

II. Introduction

Since 1997, when Congress first required independent agencies to produce strategic plans outlining the agency’s goals and mission, the FTC has continuously defined its mission as: “Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education **without unduly**

⁵ *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), <https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/>.

⁶ *Axon: Can Defendants Raise Constitutional Defenses in Court Before the FTC Forces them to Settle?*, TECHFREEDOM (May 12, 2020), <https://techfreedom.org/axon-can-defendants-raise-constitutional-defenses-in-court-before-the-ftc-forces-them-to-settle/>.

⁷ *SCOTUS Should Apply Congressional Limits Placed On FTC’s Remedy Power*, TECHFREEDOM (Oct. 2, 2020), <https://techfreedom.org/scotus-should-apply-congressional-limits-placed-on-ftcs-remedy-power/>.

⁸ TechFreedom, Comments on Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts, Docket ID: FTC-2021-0036 (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf>.

⁹ TechFreedom, Comments on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket ID: FTC-2021-0036 (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf>.

¹⁰ TechFreedom, Comments on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket ID: FTC-2021-0036 (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Exclusivity-UMC-Rulemaking-10.2021.pdf>.

burdening legitimate business activity.”¹¹ Astoundingly, the Draft Strategic Plan proposes to strike “without unduly burdening legitimate business activity” from the FTC’s mission without so much as a footnote highlighting the deletion.¹² The Draft Strategic Plan neither explains the change nor provides any alternative language. Consequently, the Draft Strategic Plan raises more questions than it answers. Moving forward, does the FTC intend to burden legitimate business activity? Does the agency now believe that certain legal or procompetitive business activities merit regulatory burdens? The Draft Strategic Plan fails to answer these questions, let alone provide any rationale for altering the FTC’s mission statement.

The FTC’s Strategic Plans, which articulate the FTC’s mission, “reflect the agency’s cumulative experience in identifying cost-effective ways to implement its consumer protection and competition missions, while also eliminating or minimizing burdens on legitimate business activities.”¹³ Experts agree with this balanced approach: “The FTC’s mission statement envisions a balancing between protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices while, at the same time, taking steps to ensure that the regulatory burden does not bog down legitimate business activity.”¹⁴

Former FTC Commissioner Maureen Ohlhausen aptly summarized the importance of “without unduly burdening legitimate business” to the agency’s mission:

Looking ahead, the FTC should focus its efforts on preventing clear harm to consumers. In the consumer protection area, this means continuing to prioritize the pursuit of fraudulent conduct that costs consumers real money, especially in tough economic times. In enforcing the antitrust laws, this means focusing on anticompetitive conduct and transactions that cause or threaten to cause significant

¹¹ Compare FED. TRADE COMM’N, STRATEGIC PLAN UNDER THE GOVERNMENT PERFORMANCE AND RESULTS ACT: FISCAL YEARS 1997 —2002 at A-4 (1997), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy97fy02.pdf, with FED. TRADE COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022 at 2 (2017), https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf (emphasis added); see also *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> (emphasis added) (last visited Nov. 29, 2021).

¹² See FED. TRADE COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2022-2026 at 4 (2021), <https://www.regulations.gov/document/FTC-2021-0061-0001> (The FTC’s Mission).

¹³ See FED. TRADE COMM’N, STRATEGIC PLAN UNDER THE GOVERNMENT PERFORMANCE AND RESULTS ACT: FISCAL YEARS 1997 —2002 at A-11 (1997), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy97fy02.pdf.

¹⁴ Svetlana S. Gans and John E. Villafrana, *Without Burdening Legitimate Business Activity: Recent Proposals to Improve the FTC’s Investigative Process and Transparency* at 10, THE ANTITRUST SOURCE (Aug. 2019), <https://www.kelleydrye.com/getattachment/1ce89d88-7220-4ac8-a8ab-05912a52cba8/attachment.aspx>.

consumer harm. In both areas, a focus on consumer harm can help avoid unduly burdening legitimate business—particularly in high-tech and other rapidly innovating industries that expand consumer choice and spur job growth. When we concentrate our scarce agency resources instead on speculative harms or harm to individual competitors, we may end up making consumers and competition worse off.¹⁵

TechFreedom implores the agency to retain the “without unduly burdening legitimate business activity” clause in the FTC’s mission and to continue using a balanced regulatory approach which allows, not burdens, procompetitive conduct.

III. The History of the FTC’s Mission

The FTC first formally articulated the agency’s mission in 1997 in compliance with the Government Performance and Results Act of 1993 (GPRA).¹⁶ GPRA established a framework for the federal government to manage and monitor the performance of federal agencies like the FTC. To comply with GPRA, agencies must set goals, devise performance metrics, and assess past results. Specifically, GPRA requires agencies to submit “strategic plans” containing “a comprehensive *mission statement* covering the major functions and operations of the agency.”¹⁷ These strategic plans cover 5-year periods, and agencies must update the plans every three years.¹⁸

A. The FTC’s Mission 1997-2022

Currently, the FTC’s mission statement reads: “Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education *without unduly burdening legitimate business activity*.”¹⁹ The

¹⁵ Maureen K. Ohlhausen, *The Federal Trade Commission at 100: Recommendations for Improving Agency Performance* at 108, FTC (Sept. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/581651/140910kovacictribute.pdf.

¹⁶ 5 U.S.C. § 306.

¹⁷ *Id.* at (a)(1) (emphasis added).

¹⁸ *See id.* at (a), (b).

¹⁹ FED. TRADE COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022 at 2 (2017), https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf (emphasis added); *see also About the FTC*, FTC, <https://www.ftc.gov/about-ftc> (emphasis added) (last visited Nov. 29, 2021).

FTC's statutorily mandated Strategic Plans, as well as the agency's website, establish and reinforce this longstanding mission.

1. FTC Strategic Plans

In September 1997, the FTC released its first strategic plan under GPRA. The 1997-2002 Strategic Plan defined the agency's mission, including the "without unduly burdening legitimate business activity" clause.²⁰ The FTC has adhered to the spirit of this mission statement for the last 25 years.

Three years after the first report, the FTC released the 2000-2005 Strategic Plan. The Statement of Mission in the 2000-2005 Strategic Plan is nearly identical to the original mission stated in 1997: "To prevent business practices that are anticompetitive, deceptive, or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions *but not impede* legitimate business activity."²¹ The 2000-2005 Strategic Plan simply replaced "without unduly burdening" with the phrase "but not impede." Despite this essentially semantic change, the agency's mission remained substantively unchanged: the FTC would not interfere with or impede legitimate business activity.

The 2003-2008 Strategic Plan reverted back to the "without unduly burdening" language.²² Since then, all subsequent FTC Strategic Plans (fiscal years 2006-2011, 2009-2014, 2014-2018, and 2018-2022) have repeated the original 1997 mission statement — front and center, year after year: the ever-present "without unduly burdening legitimate business activity" clause.²³

²⁰ FED. TRADE COMM'N, STRATEGIC PLAN UNDER THE GOVERNMENT PERFORMANCE AND RESULTS ACT: FISCAL YEARS 1997—2002 at A-4 (1997), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy97fy02.pdf (emphasis added).

²¹ FED. TRADE COMM'N, STRATEGIC PLAN FISCAL YEARS 2000 – 2005 at 1 (2000), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy00fy05.pdf (emphasis added).

²² FED. TRADE COMM'N, STRATEGIC PLAN FISCAL YEARS 2003 -2008 at 1 (2003), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy03fy08.pdf.

²³ See FED. TRADE COMM'N, STRATEGIC PLAN FISCAL YEARS 2006-2011 at 1 (2006), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy06fy11.pdf; FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2009 TO 2014 at 1 (2006), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy09fy14.pdf; FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2014 TO 2018 at 3 (2014), [HTTPS://WWW.FTC.GOV/SYSTEM/FILES/DOCUMENTS/REPORTS/2014-2018-STRATEGIC-PLAN/SPFY14-FY18.PDF](https://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf);

In that sense, the Draft Strategic Plan for 2022-2026 is a massive outlier. Fully removing the “without unduly burdening legitimate business activity” clause would break with twenty-five years of FTC precedent, foreshadowing a sea change by the agency. For example, under the proposed mission statement, the FTC might now endeavor to regulate business practices like collecting consumer data or displaying ads in exchange for free online services.²⁴ In turn, the agency would burden or impede legitimate business activity on the internet, limiting the ability of technology firms to offer products at no cost.

2. FTC.gov

In 1998, the FTC posted a mission statement on its website condemning unfair or deceptive practices while promoting pro-competitive, or legitimate, conduct:²⁵

The Federal Trade Commission enforces a variety of federal antitrust and consumer protection laws. *The Commission seeks to ensure that the nation's markets function competitively, and are vigorous, efficient, and free of undue restrictions.* The Commission also works to enhance the smooth operation of the marketplace by eliminating acts or practices that are unfair or deceptive. In general, *the Commission's efforts are directed toward stopping actions that threaten consumers' opportunities to exercise informed choice.* Finally, the Commission undertakes economic analysis to support its law enforcement efforts and to contribute to the policy deliberations of the Congress, the Executive Branch, other independent agencies, and state and local governments when requested.²⁶

Unfair and deceptive practices harm consumers and may ultimately reduce competition. In contrast, legitimate business practices fuel vigorous markets and increase consumer choice.

FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022 at 2 (2017), https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf.

²⁴ See, e.g., FED. TRADE COMM'N, STATEMENT OF THE COMMISSION ON BREACHES BY HEALTH APPS AND OTHER CONNECTED DEVICES (2021), https://www.ftc.gov/system/files/documents/public_statements/1596364/statement_of_the_commission_on_breaches_by_health_apps_and_other_connected_devices.pdf.

²⁵ On June 14, 1997, Archive.org saved a snapshot of the FTC's website in all its pre-Millennium glory. See WayBack Machine, https://web.archive.org/web/19970615000000*/https://www.ftc.gov (last visited Nov. 29, 2021). The archived website includes a webpage, last updated June 9, 1998, describing the agency's “vision, mission & goals.” WayBack Machine, *FEDERAL TRADE COMMISSION Vision, Mission & Goals*, <https://web.archive.org/web/19990218090045/http://www.ftc.gov/ftc/mission.htm> (last visited Nov. 29, 2021).

²⁶ WayBack Machine, *FEDERAL TRADE COMMISSION Vision, Mission & Goals*, <https://web.archive.org/web/19990218090045/http://www.ftc.gov/ftc/mission.htm> (emphasis added) (last visited Nov. 29, 2021).

Overall, the archived mission statement endorses pro-competitive and pro-consumer conduct — in other words, legitimate business activity. Thus, the 1998 mission statement reinforces the balanced approach articulated by the FTC’s Strategic Plans and modern-day website.

IV. Conclusion

Since 1997, the FTC’s Strategic Reports have outlined a balanced approach which identifies “cost-effective ways to implement its consumer protection and competition missions, while also eliminating or minimizing burdens on legitimate business activities.”²⁷ The FTC’s mission statement reflects this methodology, envisioning “a balancing between protecting consumers and competition...while, at the same time, taking steps to ensure that the regulatory burden does not bog down legitimate business activity.”²⁸ In *The FTC at 100 Report*, Former Commissioner Ohlhausen advised the agency to “avoid unduly burdening legitimate business—particularly in high-tech and other rapidly innovating industries that expand consumer choice and spur job growth.”²⁹

Many of the agency’s longstanding policies reflect this balanced approach.³⁰ For example, to “justify a finding of unfairness” a consumer’s injury “must be substantial; it *must not be outweighed by any countervailing benefits to consumers or competition* that the practice produces; and it must be an injury that *consumers themselves could not reasonably have avoided.*”³¹ In addition, the FTC’s Deception Statement states “the Commission will find deception if there is a representation, omission or practice that is likely to mislead the *consumer acting reasonably in the circumstances, to the consumer’s detriment.*”³² Further, Section 5(n) of the FTC Act asserts that the FTC has no authority “to declare unlawful an act or practice

²⁷ See FED. TRADE COMM’N, STRATEGIC PLAN UNDER THE GOVERNMENT PERFORMANCE AND RESULTS ACT: FISCAL YEARS 1997 —2002 at A-11 (1997), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy97fy02.pdf.

²⁸ Gans & Villafra, *supra* note 14.

²⁹ Ohlhausen, *supra* note 15.

³⁰ See John E. Villafranco & William C. MacLeod, *The Deletion of “Legitimate Business Activity” from the FTC’s Strategic Plan*, KELLEY DRYE (Nov. 29, 2021), <https://www.adlawaccess.com/2021/11/articles/the-deletion-of-legitimate-business-activity-from-the-ftcs-strategic-plan/>.

³¹ FED. TRADE COMM’N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (emphasis added).

³² FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION at 2 (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (emphasis added).

on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is *not reasonably avoidable by consumers themselves* and *not outweighed by countervailing benefits to consumers or to competition.*³³ These ‘reasonable consumer’ standards balance deterrence against the risk of unreasonable or bad-faith interpretations by consumers and distinguish between illegal conduct and pro-competitive practices. Historically, the FTC’s mission statement has reflected this understanding that a balanced approach promotes competition and benefits consumers.

In conclusion, TechFreedom implores the agency to retain the “without unduly burdening legitimate business activity” clause in the FTC’s mission and to continue using a balanced regulatory approach which allows, not burdens, procompetitive conduct.

Respectfully submitted,
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³³ 15 U.S. Code § 45(n) (emphasis added).