



November 24, 2021

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on FTC's Draft Strategic Plan for 2022-2026
Submitted via <https://www.regulations.gov/docket/FTC-2021-0061/document>

To the Federal Trade Commission:

Thank you for the opportunity to provide comments on the agency's Draft Strategic Plan for 2022-2026.¹ We are submitting these comments on behalf of our law firm, Kelley Drye & Warren LLP.

Introduction

Although the draft Strategic Plan covers a wide range of topics and issues, this comment focuses on one in particular: the deletion from the FTC's Mission Statement of language stating that the agency will accomplish its mission "without unduly burdening legitimate business activity."² This language has appeared in the FTC's Mission Statement (and numerous other materials and publications) for decades, through both Democratic and Republican administrations.³ It reflects foundational principles that underlie the FTC's legal authority to protect consumers and competition. Deleting it sends a strong message to the public and the marketplace that preserving and encouraging legitimate, competitive business activity is no longer an FTC priority worth mentioning in the Mission Statement. For the reasons discussed below, we believe this is a wrong (and indeed harmful) message to send, and ask that you restore the deleted language to the Mission Statement.

As background, our firm has practiced before the FTC for decades, representing companies large and small in a broad array of matters involving consumer protection and competition. Our members include three former FTC Bureau Directors (representing both political parties), other former FTC officials, and attorneys who regularly represent interests before the Commission. We believe that the FTC serves a vital purpose in preventing anticompetitive, unfair, and deceptive

¹ FTC Invites Public Comment on Draft Strategic Plan (Nov. 12, 2021), <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-invites-public-comment-draft-strategic-plan>.

² See FTC Strategic Plan for Fiscal Years 2022-2026, at 4, <https://www.regulations.gov/document/FTC-2021-0061-0001>.

³ See, e.g., FTC Strategic Plan 1997-2002 (Chairman Robert Pitofsky), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy97fy02.pdf; FTC Strategic Plan 2003-2008 (Chairman Timothy Muris), https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy03fy08.pdf.

practices and that the principles that have long governed its mission (including the now-missing phrase) are essential to its success. We offer these comments based on our collective expertise on the issues, and not on behalf of any particular client or clients.

The Deleted Language: Avoiding Undue Burden on Legitimate Business Activity

Here is what the mission statement has said (in some form or variation) for decades:

Our Mission: Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.⁴

Here is the language in the draft Strategic Plan for 2022-2026:

The FTC’s Mission: Protecting the public from deceptive and unfair business practices and policing unfair competition through law enforcement, advocacy, research, and education.

While it is tempting to parse every word change (Is “policing” meant to underscore the FTC’s new regulatory bent? Does “protecting the public” have a broader meaning than “protecting consumers and competition?”), we focus here on the deletion of “without unduly burdening legitimate business activity.” For years, this phrase has communicated that, in enforcing the law and developing regulations, the FTC will tailor its allegations, prohibitions, and remedies to *illegal* conduct, and will take care to preserve the legitimate business functions that provide products and services to consumers and maintain our vibrant, competitive economy. Put another way, the Commission has recognized that legitimate business activity *benefits* consumers and competition, and has consistently made a public commitment to preserve it.

The Significance of this Language and Principle in FTC Law and Policy

This principle underlying the deleted language is built into the laws and policies that have long governed the agency. For example:

Unfairness: The FTC’s three-part test for unfairness, which was codified by Congress in 1994, states that the Commission may not find a practice to be unfair unless it “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.”⁵ This balancing weighs the costs and benefits of a business practice—to consumers, competitors, and the marketplace as a whole. As the Commission explained in its 1980 Unfairness Statement on which the 1994 statutory standard was based, “The Commission . . . takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the

⁴ This language was still posted on the FTC’s website as of this writing. See About the FTC, <https://www.ftc.gov/about-ftc>.

⁵ 15 U.S.C. § 45(n).

agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.”⁶

Deception: Under the FTC’s Deception Statement,⁷ the principles of which are now reflected in decades of case law, companies are not strictly liable for every statement that a particular consumer might misunderstand. Rather, the statement (or omission or practice) must be *material* and likely to mislead a *reasonable* consumer, reflecting a balance between a company’s obligation to avoid deceptive practices and its burdens in anticipating and avoiding every possible consumer interpretation and effect.

Substantiation: The Commission’s Substantiation Policy Statement, a distillation of case law that summarizes how companies must substantiate their advertising claims, states:

The Commission's determination of what constitutes a reasonable basis [to substantiate a claim] depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.⁸

Again, it sets forth a balancing test that weighs the likely harm to consumers against the cost of substantiation to legitimate businesses.

“Fencing in”: Under a longstanding legal doctrine called “fencing in,” the FTC may extend order provisions beyond the specific conduct that violated the law if doing so is necessary to prevent future violation—but *only if* the broader provisions are “reasonably related” to the violation. In determining whether the provisions are reasonably related, the Commission must consider (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations.⁹ In other words, the Commission must balance the benefits of limiting future business activity (i.e., stopping potential violations) against the likelihood of the violations, in order to prevent undue burdens on legitimate business activity.

⁶ FTC Policy Statement on Unfairness (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>. The 1994 codification also made clear that “established public policies” (such as other laws or judicial decisions) could be considered as evidence to support a finding of unfairness, but could not serve as the primary consideration for such determination. 15 U.S.C. § 45(n).

⁷ FTC Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

⁸ FTC Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984), <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation> (appended to *FTC v. Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984)); *see also In re Pfizer, Inc.*, 81 F.T.C. 23, 62-64 (1972).

⁹ *See Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) and *FTC v. Thompson Med. Co.*, 104 F.T.C. 648, 883 (1984)), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

Unfair Methods of Competition: Finally, in determining whether a practice is an “unfair method of competition” under Section 5, courts have consistently distinguished between anti-competitive practices that are unreasonable and illegal, and legitimate business practices that simply have an *impact* on competition. For example, in a particularly apt case from 1984, the Second Circuit reversed a Commission decision finding that the pricing practices of four gasoline manufacturers, though not collusive, had the *effect* of stabilizing prices and lessening competition, in violation of Section 5.¹⁰ The court stated that the Commission must distinguish between “normally acceptable business behavior” and unreasonable conduct in order to avoid “arbitrary and capricious” application of Section 5.¹¹ Although the court recognized that Section 5 extends beyond the requirements of the antitrust laws, it held that even in a concentrated industry, the conduct could not be found to be unfair absent an agreement between competitors or some proof of wrongdoing, such as “evidence of anticompetitive intent” or “the absence of an independent legitimate business reason” for the challenged conduct.¹² In other words, here again, the FTC must not impose undue burdens on legitimate activity.

What Does this Omission Signal About the FTC’s Plans?

We have no inside knowledge regarding the reasons for omission of the “legitimate activity” language. Nor do we know what exactly it portends for future FTC cases, rules, and policies—all of which will need to follow applicable law and precedent, regardless of statements in the FTC’s Strategic Plan. However, some of the FTC’s policy announcements in recent months do indeed suggest a new direction—one that places less emphasis on preserving legitimate business activity, and more on pursuing policy goals through aggressive interpretation of FTC authority. Examples include:

- Repeated references to online behavioral advertising as “surveillance” without recognition or discussion of the legitimate business practices being tossed into this bucket—such as personalized content and suggestions, coupons and discounts, information about past purchases, and access to free products and services that many consumers want.¹³
- A stated goal to impose more “substantive limits rather than procedural protections” on business practices (through both the FTC’s Magnuson-Moss rulemaking and FTC orders) without discussing the limits of doing so under current law, and the important balancing of benefits and burdens that would be required.¹⁴

¹⁰ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-39 (2d Cir. 1984).

¹¹ *Id.* at 138.

¹² *Id.* at 139.

¹³ *See, e.g.*, Statement of Lina Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), <https://www.ftc.gov/public-statements/2021/10/statement-chair-lina-m-khan-regarding-report-congress-privacy-security>.

¹⁴ *Id.* (citing law review articles advocating changes to existing laws that authors view as insufficient). Substantive limits on data collection, use, and sharing exist now in various federal sectoral laws (*e.g.*, the Children’s Online Privacy Protection Act) and in state privacy laws enacted in California, Virginia, and Colorado. Similar limits

- Rescission of the FTC’s 2015 Competition Policy Statement because its focus on cost-benefit analysis and competitive markets was too narrow.¹⁵
- The FTC’s imposition of prior approval requirements for mergers, including its recent announcement that companies that agreed to merger orders must obtain prior approval from the agency “before closing *any* future transaction affecting each relevant market for which a violation was alleged, for a minimum of ten years.”¹⁶

We urge the FTC to reconsider its decision to delete this language from its Mission Statement. Vigorous competition among legitimate businesses delivers the rich array of products and services that U.S. consumers use and enjoy every day—in technology, health care, financial services, consumer goods, housing, entertainment, transportation, and every sector of the economy. It drives companies to improve their products, reduce their costs, and provide information to consumers about their offerings. This type of activity must be protected and encouraged.

* * *

We appreciate the opportunity to comment on the agency’s 2022-2026 Strategic Plan. If you have any questions about this comment, please contact Jessica Rich (202-342-8580), Bill MacLeod (202-342-8811), or John Villafranco (202-342-8423).

Respectfully Submitted,

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also have been proposed in various federal bills, and by interest groups and academics supporting new or stronger federal privacy laws. However, the existence of such limits in *other* laws and proposals does not import them into the FTC Act, or suggest that they can be imposed without the balancing of interests required under both the deception and unfairness tests.

¹⁵ FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>. Among other things, the Commission rejected the need to evaluate whether particular business conduct is “unreasonable,” including by determining whether the procompetitive effects of the conduct outweigh any anticompetitive effects.

¹⁶ FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive>.