

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

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Submitted via regulations.gov

Honorable Lina M. Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue Northwest
Washington, District of Columbia 20580

Re: Draft FTC Strategic Plan for FY2022-2026

Chairman Khan:

Washington Legal Foundation submits this comment about the proposed change to the Federal Trade Commission's mission statement. As explained below, the FTC's current mission statement tracks the FTC's statutory authority while the proposal would lead to a mission that violates federal law. Because the proposed revision would also harm America's economy, WLF strongly opposes FTC's amending the mission statement by allowing the FTC to unnecessarily burden legitimate business activities.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF often submits comments on proposed FTC actions. *See, e.g.,* WLF Comment, *In re Rescission Of 2015 FTC Statement On Unfair Methods Of Competition* (June 28, 2021); WLF Comment, *In re FTC Study Of Digital Technology Market Merger Review* (Nov. 19, 2018).

WLF also appears before federal tribunals urging successfully that the FTC not be permitted to act outside its statutory authority. *See, e.g.,* *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019). WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on legal issues related to the FTC's overreach. *See, e.g.,* Steven Cernak, *U.S. Merger Review Process Changing Before Our Eyes*, WLF LEGAL BACKGROUNDER (Nov. 12, 2021); Edward B. Schwartz & Gregory Vose, *"Don't Know Where We're Going, But We're on Our Way": FTC's Antitrust Remodeling Creates Chilling Uncertainty for Deal Making*, WLF LEGAL OPINION LETTER (Oct. 28, 2021).

I. The FTC Lacks Constitutional And Statutory Authority To Unnecessarily Burden Legitimate Business Activities.

A federal agency's authority is limited by the Constitution and federal statutes. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488-89 (2021) (*per curiam*). When an agency exceeds its statutory authority, its actions are either void or voidable. The FTC lacks both the constitutional and statutory authority to unnecessarily burden legitimate business activities.

The Fifth Amendment of the United States Constitution bars the federal government from taking property or limiting liberty without due process of law. U.S. Const. amend. V. The FTC proposes taking property from businesses and depriving individuals of liberty to advance its goals. There is no other way to characterize the burdening of legitimate business activities. So the only question is whether FTC is providing these businesses and individuals with due process of law.

The Supreme Court has explained that in some cases the only process due is legislative process. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985). Sometimes, Congress gives administrative agencies the authority to provide process for parties, with review by federal courts. But the Constitution does not allow agencies to engage in activities outside their statutory authority. Because, as described below, the FTC lacks the statutory authority to burden businesses in the proposed manner, it would also violate the Constitution.

The FTC is charged with protecting competition (not competitors) and consumers. No federal statute gives the FTC authority to unnecessarily burden legitimate business activities just to pursue policy objectives. There is at least a colorable argument that the FTC may burden legitimate business activities when necessary to achieve its statutory objectives. But that does not extend to unnecessary burdens.

The Supreme Court's recent decision in *AMG Capital* highlights how the FTC's proposed approach ignores the U.S. Code. There, the FTC argued that its authority to seek injunctive relief included the ability to seek disgorgement. In analyzing the issue, the Court focused on what Congress authorized. *See AMG Cap.*, 141 S. Ct. at 1346. In other words, "[d]id Congress" authorize the FTC "to obtain monetary relief directly from courts." *Id.* at 1347.

The Court then examined the statutory language and context to determine if Congress authorized the FTC to seek disgorgement in court.

Based on this extensive review of the FTC Act, the Court held that the statute bars courts from granting the FTC equitable monetary relief—including disgorgement. *AMG Cap.*, 141 S. Ct. at 1347-49.

The FTC and its *amici* argued that the Court should still recognize the disgorgement remedy for policy reasons. *See AMG Cap.*, 141 S. Ct. at 1351-52. This is much like the FTC’s rationale for amending its mission statement: It wants to amend the mission statement for policy reasons. The current FTC doesn’t like promoting consumer welfare. Rather, it wants to decrease overall wealth through redistribution programs. The Court rejected the FTC’s argument in *AMG Capital. Id.* at 1352. The Commission should similarly reject the proposed amendment to its mission statement. The FTC cannot unnecessarily burden businesses without congressional authorization.

True, merely amending the FTC’s mission statement does not violate the Constitution or laws of the United States. But it makes no sense to have a mission when fulfilling that mission would be unconstitutional and violate federal law. The FTC should not go down this road by amending its mission in this way. Rather, it should acknowledge that its actions may not unnecessarily burden legitimate business activities.

II. Unnecessarily Burdening Businesses Will Harm The Economy.

It’s disappointing to see an agency with a Bureau of Economics flunk Economics 101. The proposed amendment to the FTC’s mission to allow unnecessarily burdening businesses’ legitimate activities will harm the economy. If that is the FTC’s goal, it should say so and move forward with the proposal. But if the FTC is interested in the good of the country, its citizens, and the world, it will realize that harming the economy is a bad idea.

Businesses’ ability to make a profit is what “produces innovation and economic growth.” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)). Yet if the FTC changes its mission statement it would be sending a message that it can take away those profits for no reason other than the FTC’s policy goals. In other words, companies will have to worry that they will no longer be profitable because of the FTC’s actions. This would lead companies to decrease how much they invest in innovation. This in turn would slow economic growth and potentially cause a recession, all because of regulatory uncertainty.

The then-Chairman of the Federal Reserve testified before Congress that regulatory uncertainty hurts economic growth. See Senate Budget Committee, *Testimony of Chairman Ben Bernanke*, YouTube (Feb. 7, 2012), <https://bit.ly/380rMXv> (starting at 4:30). The IMF's chief economist has echoed those sentiments. KR Srivats, *Policy certainty, structural reforms are key to growth: IMF's Gita Gopinath*, The Hindu Business Line (Dec. 20, 2019), <https://bit.ly/3n0eM8x>. Others agree. See Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—the Changing CMRS Roadmap*, 56 Fed. Comm. L.J. 489, 547 (2004); Note, *Administrative Law—Judicial Review of Treasury Regulations—Federal Circuit Invalidates A Treasury Regulation Under State Farm for Lack of Contemporaneous Statement of Justification—Dominion Resources, Inc. v. United States*, 681 F.3d 1313 (Fed. Cir. 2012), 126 Harv. L. Rev. 1747, 1754 n.46 (2013).

There is no need to create regulatory uncertainty by amending the FTC's mission. Rather than stick to its statutorily authorized activities, the amended mission statement suggests that the FTC may act as an economic oversight board that unnecessarily burdens businesses' activities. This it should not do.

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The FTC keeps losing in court over its statutory authority—for good reason. It continues to ignore the Constitution and laws of the United States to push an agenda designed to damage America's economy. Changing the mission statement is another step in that direction. The FTC should change course and realize that its job is to promote economic growth—not stymie it. The FTC should therefore keep the current mission statement's language.

Respectfully submitted,

John M. Masslon II
SENIOR LITIGATION COUNSEL

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION